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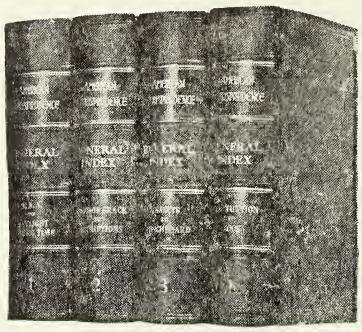

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1953-1954

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THE SCHOOL OF LAW—THE FIRST HUNDRED YEARS

*Robert J. Farley**

In 1948 the University celebrated its centenary. This year the School of Law passes the century mark. It cannot be inappropriate at such a time to review in some fashion the first hundred years, to try to express what sort of institution the Law School is, and to estimate what we may reasonably expect the Law School to achieve and to become.

It was in 1854 that the Legislature, in response to a memorial of the trustees presented by Honorable Jacob Thompson, established in the University a Department of Law, by an "Act to Create in the University of Mississippi a Professorship of Governmental Science and Law." Judge William F. Stearns of Holly Springs was elected to the chair, and he proceeded to organize a two-year course leading to the LL.B. degree. The first class, of six students, was graduated in 1856. The following year, by act of the Legislature, a diploma in law from the University was made sufficient evidence of learning to entitle the holder to a license to practice.

Six years after the Law School was established, the Legislature created a second chair of law, to which Judge James F. Trotter of Holly Springs was elected. All departments of the University were closed in 1861, and it was not until 1867 that the Department of Law was reorganized by L. Q. C. Lamar, who held the chair of "Governmental Science and Law" until 1870, when he resigned to enter Congress. After Lamar there came successively Colonel Jordan M. Phipps, Judge Thomas Walton, Chancellor Edward Mayes, and Justice Albert A. Whitfield, all of them distinguished alumni of the Department of Law. Governor Garvin D. Shands was called to the chair of law in 1894, and in 1897 Dr. Thomas Somerville of the Winona Bar was called to the newly restored second chair of law. Soon afterwards, the office of Dean of the Department of Law was created and given to Governor Shands, who, upon his retirement in 1905, was succeeded by Dr. Somerville. In 1913, when Dr.

*Dean, School of Law, University of Mississippi.

Somerville retired to return to practice, Dr. Leonard J. Farley was elected dean. Dr. Leonard J. Farley served until 1921 when he was succeeded by Judge Thomas C. Kimbrough. In the years from 1897 to 1921 the faculty of the Department of Law consisted of a professor of senior law and a professor of junior law.

At the beginning of the administration of Judge Kimbrough, the course of study was increased to three years, and the Department of Law became known as the School of Law. Twenty years later, under Judge Kimbrough's guidance, the School of Law had grown to a faculty of five full-time and two part-time members and to an enrollment of just under one hundred students. The *Mississippi Law Journal* had been founded in 1928; Lamar Hall, the new law building named for L. Q. C. Lamar, had been in use since 1930; the pre-admission requirement had been fixed at two years of college training; the curriculum had been strengthened by the addition of courses in Mississippi Pleading and Practice, both law and chancery; and the school had been fully accredited by the American Bar Association and the Association of American Law Schools for many years. During that period the Law School enjoyed the able services of Judge W. A. Roberds, now on the Supreme Court; of Judge D. M. Russell of Gulfport; and of Judge Stone Deavours, an outstanding lawyer from Laurel, who was dean from 1930 through 1932.

The Second World War was a difficult time for this as for all other law schools; most of our students and three of the full-time faculty were called to the service, but with the help of Messrs. Taylor McElroy, Chester Sumners, Hollis Brown, L. C. Andrews, and of Chancellor A. B. Butts, Judge Kimbrough succeeded in keeping the school open throughout the war. At the time of Judge Kimbrough's death on December 31, 1945, returned veterans had increased enrollment to forty-five and the continued existence of the school was assured.

When I became dean in 1946, the influx of veterans was assuming the proportions of a flood. To meet the necessities of this wholly new situation, so different from the conditions of the war years, the faculty was increased to seven full-time and three part-time members—its present size; the curriculum was further expanded; an accelerated program of three semesters a year was adopted (it is still in effect); the requirement for admission was increased from completion of one-half to completion of three-fourths of the work necessary for a bachelor's degree at an accredited institution; the minimum requirement for the LL.B. degree was raised from 78 to 82 hours; and a comprehensive course of practical training was begun as an adjunct to classroom work. A corresponding development went forward in the library, which had been necessarily somewhat neglected during the war. In recent years new books have been acquired at an average rate of 850 a year, and the library now con-

tains more than 30,000 volumes and has in fact outgrown its physical facilities.

No account of the Law School would be meaningful which omitted to touch however lightly on the work of the *Mississippi Law Journal,* now in its twenty-fifth year of continuous publication, and of the Moot Court Board. The *Journal* is of course the official organ of the Mississippi Bar Association, and the October issue each year is devoted principally to the proceedings of the convention of the State Bar, as all readers of these pages know. What is perhaps less well known is that, apart from its utility to the Bar, the *Journal* is an important and almost an indispensible part of education at the Law School. The members of the board of the *Journal*—the editor, business manager, note editor, case comment editors, book review editor, and the several associate editors—are appointed by the faculty on the recommendation of the faculty adviser, Mr. Arthur B. Custy, selection being based on scholarship and editorial ability; and each member of the *Journal* board who satisfactorily fulfils his duties receives two hours of academic credit for what amounts to a valuable addition to academic work.

The chairman and members of the Moot Court Board are appointed by the faculty on the basis of their scholarship and aptitude and upon the recommendation of the faculty adviser, Mr. William P. Murphy. The Moot Court Board is in charge of the program of appellate and trial work, which should be described briefly. In his second semester each student is required to brief and argue an appellate case to a court composed of three senior students. In his third semester he enters upon a competitive series of such appellate arguments, continued at the rate of one each semester until the contestant either is eliminated or reaches the finals in his sixth semester. Arguments are made in the third and fourth semesters to a court consisting of one faculty member and two senior students, and in the fifth semester to a court of three faculty members. As there are three graduating classes a year, there necessarily also are three final moot court arguments. The final argument in the fall semester is made to the Supreme Court, in Jackson; the final argument in the spring and summer semesters is made to a court of three trial judges or practicing lawyers invited to the law school for the occasion. In every case a judgment is rendered based not on the law but on the relative excellence of the briefs and oral arguments. For his first or non-competitive argument a student receives one hour's credit, and a second hour is given at the satisfactory completion of his second, competitive, argument. Facts are issued and dockets set by the Moot Court Board.

There is also a required program of trial practice, for which, however, no credit is given. In each of his last two semesters every student

must prepare and try one circuit case and one chancery case. The court for these trials is Mr. Bramlett Roberts, a practicing lawyer and county attorney of Lafayette County. Juries for the circuit cases are drawn fom the first year class, and facts are issued and dockets arranged by the Moot Court Board.

As our graduates have the diploma privilege and many of them go directly into practice by themselves, we feel an obligation to offer the largest possible amount of practical training. Therefore, in addition to the required appellate and trial work, there is a continuing course of training in the preparation of legal documents, conducted from the third through the sixth semesters by Mr. Roberts, who meets with the students of each of these semesters separately for an hour a week. General Practice is required but carries no academic credit. In the third semester students learn to draw affidavits, bills of sale, deeds, powers of attorney, indictments, and simple contracts. In the fourth semester, having had Real Property and Titles, they prepare an abstract of title to some particular piece of land in the county. In the fifth and sixth semesters they prepare such documents as wills, declarations of trust, deeds of trust, and more complex contracts, and complete the papers necessary to organize a corporation and to administer an estate. Through this unusually extensive program of training we hope to equip our students, as well as we can, for the successful practice of law.

We are a local law school and most of our students are Mississippians, but in the past year we have admitted students from ten states other than Mississippi and from Puerto Rico and the District of Columbia. We have also sent students forth to advance work at other institutions of higher learning. Since 1948 thirteen of our alumni have been accepted for graduate study in law at Yale, Harvard, George Washington, and New York University.

Our faculty, which represents a considerable range of training and experience, consists at present of Messrs. John H. Fox, Jr., Mississippi College, University of Mississippi, Yale University, who has practiced in New York City and Jackson; J. W. Bunkley, Jr., William and Mary, University of Mississippi, Yale University; Hector Currie, University of Mississippi, Yale University, Oxford University, who has practiced in Atlanta; Arthur B. Custy, University of Mississippi, Yale University; Harold G. Wren, Columbia University, Yale University, who has practiced in New York City and is now on leave of absence as a Fulbright Fellow to Japan; William P. Murphy, Southwestern and the University of Virginia, who has practiced in Washington, D. C.; L. G. Fant, Jr., Vanderbilt University, Harvard University, who is practicing in Holly Springs; Landon C. Andrews, University of Mississippi, who practices in Oxford, former state senator, many times special chancellor; Bramlett Roberts,

University of Mississippi, who practices in Oxford, county attorney for several terms; Jackson D. Doty, University of Mississippi, who practices in Pontotoc; Corinne Bass, librarian and instructor in bibliography, Newcomb College and Columbia University; and the writer, University of Mississippi and Yale University, who formerly practiced in Oxford.

Outstanding scholars and authorities in various fields are invited from time to time to speak to the Law School. In the past year we have heard lectures on labor relations by Mr. Clinton Golden of Harvard University; on mental illness by Dr. W. L. Jaquith, Director of the Mississippi State Hospital for the Insane; on legal education and on arbitration by Dean Wesley A. Sturges of the Yale Law School; on civil procedure and on evidence by Professor Edmund M. Morgan of the Vanderbilt Law School, formerly of Harvard; and on legal philosophy by the Reverend Thomas Edward Davitt, S. J., of the St. Louis University School of Law.

The Law School wishes to make itself useful to the State Bar. To this end we have organized or helped sponsor numerous short courses or conferences for practicing lawyers. Each December for several years a two-day program on some topic interesting to the profession has been sponsored in Jackson jointly wth the Jackson Junior Bar; these events have been well attended, and the one just past was notably successful. In May 1953 a two-day "Conference in Estate Planning" held at the University attracted more than 250 lawyers, accountants, trust officers, and life underwriters, and it is planned to make this an annual affair. A two weeks "Tax Program for Practicing Lawyers," conducted by Professor William J. Bowe of the Vanderbilt Law School and by Professor Harold G. Wren, assisted by visiting lecturers, was offered in August 1952 and again in the late summer of 1953, and it is expected to be offered for the third time next summer.

Plans are now on foot to add to the law building so as to provide badly needed additional space, particularly for the library, which is overflowing its shelves. With enough added room we can systematically strengthen the library, and with a substantially improved library we can put in operation two projects that are now underway in several other states: namely, first, a study of needed improvements in our state laws, which should be undertaken cooperatively by the Bar and the Law School; and, second, some method of organized assistance in drafting desirable new legislation. Thus the Law School enters its second century with a vision of enlarged service to its students, the members of the Bar, and all the people of the state.

THE TASK OF THE AMERICAN LAWYER†

*Roscoe Pound**

It is not merely that nine million people annually are injured seriously enough to get into the statistics which points out to us a task of making prompt inexpensive and adequate reparation available to the one in eighteen of the population of the country. It is a cardinal task of the legal profession to assure complete, speedy, effective justice to every one so far as that may be achieved by law. Justice, the promoting and maintaining of the ideal relation among men, was pronounced by Daniel Webster the chief interest of men on earth. Nothing less than a complete equal justice to all must be our goal because we are lawyers and as such have a duty to the profession and to the public to exert ourselves to that end.

Industrialization, urbanization of our communities, mechanizing of everything men do and of everything they work with, play with, and encounter in their every day tasks, demand scrutiny of our whole apparatus of adjusting relations and ordering conduct by the orderly and systematic application of the force of politically organized society. In contrast to the pioneer, rural, argicultural society in which our law grew up, we live in continually more and more crowded communities, in which we must perforce modify our inherited ideas as to the full liberty of using inherent in ownership of land. We are having to reconcile them with and adjust them to the demands of the humanitarian ideas of a time when large numbers of people have no or no sufficient place in which to walk about, and children find few places in which to play, and so have had to reshape the law as to casting an unreasonable risk of injury upon trespassers. In contrast to the days when men went about in horse drawn vehicles, reaped with a scythe or a cradle, and threshed with a flail, we now travel in stream-lined trains and motor vehicles and airplanes at what would have seemed to our fathers incredible speed, and accidents from mechanisms out of control and to some extent beyond ordinary powers of control are incident to our everyday life in all callings.

Every advance in human harnessing of nature to man's use has brought new danger of injury. It is proving no easy task today to keep our legal institutions and doctrines abreast of the progress. If we learn to deal with one new type of danger, as we dispose of it many others arise in its place. As we patch up our machinery of social control to

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†From an address delivered before the Eighth Annual Law Institute in Jackson, Mississippi, on December 12, 1953.

*Editor-in-Chief, *NACCA Law Journal;* Dean Emeritus, Harvard University School of Law.

enable us to take care of one of them, the patched machinery has to be applied to others before experience has enabled it to dispose effectively of the one it was designed to correct. All this is happening in the present century at an increasingly rapid rate. As the demands of justice according to law have been imposing continually heavier burdens upon our inherited legal system, the means of meeting them by legislation have been straining to meet new problems of the social and economic order and the courts have been pressed to do a work of lawmaking for which they were not designed and for which, as they had been set up for the needs of the rural, agricultural society of our formative era, they were ill adapted. Even more than the lawyers of the time of making over of the seventeenth and eighteenth century English common law to the needs of independent America, the legal profession of today has a duty of zealous organized effort to make American justice according to law adequate to the demands of the society of the time.

I repeat. This task of shaping our legal institutions and doctrines and technique to the exigencies of full, speedy, effective justice in the society of twentieth-century America is one for the lawyer as incumbent upon the legal profession which, as a profession, must be governed by a spirit of public service inherent in the very idea of a profession.

What are the main items of the task of improving the administration of justice in America to which we should be devoting thorough study and zealous organized activity? One is a modern organization of courts from the bottom to the top. I invert the phrase purposely because the courts lower in the scale are so often neglected, need better organization and better provision for what they have to do than they receive almost everywhere, and are so necessary to the great mass of the people who come in contact with them only.

Most of the states have outgrown the type of organization of courts which grew up after the American Revolution to the historical English model given up in England in 1873. Much progress has been made in recent years in a number of states and there has been patchwork improvement here and there in many. But looking at the country as a whole what we have been doing piecemeal for parts of the judicial system ought to be done thoroughly for the whole. The conspicuous defects in the organization of the state courts, as we remade it to the old English model in the nineteenth century, were waste of judicial power, waste of time and money of litigants and of public time and money because of hard and fast jurisdictional lines, ill defined and frequently changed before judicial decision could draw clear bounds, piecemeal handling of single causes simultaneously in different courts, and general want of cooperation between court and court and between court and judge in the same court for want of any real administrative head. Suc-

cessive appeals not merely to correct errors but in their original reason chiefly to provide a machinery for settling the law by judicial decision, in too many states impose an unjust hardship in the way of delay and expense upon poor litigants. Meritorious cases too often have to be abandoned or settled because of the cost of taking them to the ultimate court of review which is more than the case will bear. Points of law have been known to remain open and embarrass the meritorious claims of poor litigants because of the cost of taking them through a succession of courts to the ultimate court of review where the law may be definitely pronounced not merely for the case in hand but for all others to come. In particular, organization of courts should carry with it organization of the administrative work of the courts. In the federal judicial system and in a few states this has now been taken care of. But almost everywhere unbusinesslike methods remain as they were in the formative era of our system or even as they came over from England in the colonial era and make the course of justice in the courts needlessly expensive to those most needing the help of the law and least able to bear the cost. There have been and may still be jurisdictions in which the costs in judicial proceedings have been used as a means of general public revenue to pay expenses of government.

Again, if we demand that our courts do things we must give them the power to do them. We must set them free to do them. Undoubtedly we must hold them to the duly enacted substantive law. But we must not make the substantive law nugatory in practice by loading tribunals with hard and fast procedural requirements beyond their power to relieve. We must cease to prescribe the details of procedure by legislation. New Jersey now gives the courts full control over procedure by constitutional provision. In fourteen states and in the federal courts there is now an all but complete rule-making power actively exercised. It is dormant or limited in eleven others. Where it is dormant or limited or non-existent the bar should bestir itself to bring the machinery of justice abreast of the needs of the time.

Even more important is the selection, mode of choice, and tenure of judges. There can be no greater mistake than thinking that the victims of accident in our crowded, urban, industrial, mechanized society have an advantage from a politics-ridden bench subjected to choice by primary nomination and popular election. Two exhaustive studies of the subject in the present century have shown the fallacy of the argument that the short-term elective judges are the more liberal in finding and applying the law. On the contrary, the two published studies as well as studies I have made in the state reports since 1920 show that the judge appointed on the basis of his standing in the profession, with no election to fear, has uniformly proved the more able to see through procedural tangles to the merits and to reach results both liberal and sound

in principle. He is not prone to avoid difficult decisions on the merits for fear of giving offense nor to take refuge in technicalities of procedure to escape having to pass on the merits of hard cases. It is true that in rural, agricultural communities, where the lawyers are well known to the public, the elective system originally adopted for such communities still works reasonably well. But in the large industrial city of today, where lawyers are chiefly known to the public from sensational notices of trials, particularly criminal trials, in the press, the legal Barnum who operates in a circus court has an unfair advantage in the primary election where the candidate's chief asset is publicity. Full justice demands the strongest, best trained, most experienced, fearless judges and magistrates we can secure.

A fourth point, hardly less important, is an active organized bar. There is a not uncommon belief among laymen that lawyers are not necessary to the administration of justice. Every Utopia represents an ideal community without lawyers. Every revolution from Jack Cade's rebellion to the French Revolution, to the Russian Revolution, has involved attempt to administer justice without lawyers. Colonial America made the attempt and it went far toward adoption after the American Revolution. But law and a profession of law have come to be developed in all civilized societies and have maintained themselves so persistently that in Soviet Russia it has been found necessary to restore lawyers more and more as an institution. Moreover, as Wigmore has put it, "The most important thing about the practice of law is that it is, and in the inherent nature of things demands always that it shall be, a profession." From the very nature of the lawyer's work, the practice of law should be carried on by an organized body of men pursuing a common calling as a learned art in the spirit of a public service. But today there are serious threats to the idea of a legal profession. One is that in the economic order of the time individual responsibility as a member of a profession is more or less lost and economic pressure upon the lawyer may make the money-making aspect of the calling the primary or even the sole interest. To the young lawyer at the outset there is peril in the conditions which often make him seem an employee at a small salary in a body of workers for an employer and so to bring him into the field of "white collar workers" organized in trade unions. Above all is the threat that in the development of administration in the service state the adjustment of relations and ordering of conduct will be turned over to administrative agencies operating without lawyers. Effective service to the public, assured by the tradition of the duty of the lawyer to the client, to the profession, to the court, and to the public, authoritatively declared in codes of professional ethics, taught by precept and example and made effective by the discipline of an organized profession cannot be had from unorganized individual practitioners, responsible to no one, not bred to

a professional tradition and motivated, as in a trade, solely by quest of pecuniary gain. Even less can the professional tradition be replaced by a political tradition of office holders, owing allegiance to political parties and depending for advancement on the favor of political leaders. If reparation to the injured is to be kept within the domain of law, lawyers must be vigilant and united in maintaining an organized profession.

No less imperative is improvement of the substantive law to the exigencies of justice in the humanitarian path in which the law is moving today. Some of this task must be achieved through legislation which the bar must be urging where legislatures have been inactive. An example is legislative adoption of the rule of comparative negligence where the old hard and fast regime of contributory negligence still obtains. Happily, in this state that narrow doctrine has been superseded. But there are too many in which legislation is sorely needed. It will not come of itself and should be pushed by the organized profession.

Much of the improvement of the substance of the law which particularly concerns the profession is to be had through the courts, through reshaping the law to the conditions of our time. There is need of pruning away of many leftovers from doctrines and rules and institutions now generally abandoned. One example which will occur to you at once is the simple tool doctrine, a remnant from the principle or starting point for legal reasoning which gave us assumption of risk and contributory negligence as a bar. What is especially needed here is an intelligent theory and discriminating theory of stare decisis.

I have no sympathy with those who would reject stare decisis entirely and have every case decided solely on its own facts, rejecting general rules, principles as authoritative starting points for legal reasoning applied to given states of fact, and general doctrines. We must distinguish deep-seated doctrines which affect much more than a precise point or involve a general principle or starting point for reasoning in many types of cases so that if abrogated for the exigencies of one case they may upset the law at many points and lead to results which may not be predicted. In such cases there ought to be legislation to make the adjustment and prevent litigation for an indefinite future till the situation can be untangled judicially as cases arise. They may be long in arising because it is expensive to go to the highest court simply to clarify the law. Few public spirited lawyers are likely to emulate the example of the learned counsel troubled by Lord Mansfield's innovations who left a will purposely and elaborately drawn so as to raise every question which Mansfield's decisions suggested and left unsettled. Unhappily the learned lawyer's heirs settled his estate by agreement and the confused state of the law remained to vex the next generation. But this does not apply to remnants remaining in the law after the principle behind them has

been given up. It does not apply to doctrines built on a mistaken foundation persisting in the books after that foundation has been undermined, and out of accord with general principles recognized today, so that if they are rejected the general law will be clarified rather than unsettled. Such, for example, is the doctrine of the immunity of charitable hospitals and like institutions. This has now been given up by adjudication in twenty jurisdictions, but is adhered to still in twenty-six, in eight of which only is complete immunity preserved. The immunity given to charitable institutions for tortious conduct ran counter to general principles of the law. The general rule is that charity is no defense to tort. The doctrine in this country was based on dicta of an English Chancellor who is not outstanding in the role of the English judiciary and was rejected in England before it was taken over in the United States. It is a good example of the judicial duty of ridding the law of such anomalies.

Another example is to be seen in the persistence at this late day of a habit of regarding great pieces of social legislation, universally enacted in the common-law world, as no part of the general law but something to be held down to the four corners of a statute.

There are four possible ways in which courts might deal with legislative innovation. (1) They might receive it fully into the body of the law as affording both a rule to be applied in cases within its immediate purview and a principle from which to reason by analogy, and might hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject, and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or coordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the general body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field for which it seeks to provide. (4) They might not only refuse to reason from it by analogy and apply it directly only but also give it a strict and narrow interpretation, holding it down rigidly to those cases which its language covers expressly.

Of these four conceivable methods of viewing a fundamental change in the law the fourth represents what was once taken to be the orthodox common-law attitude toward legislative innovations. Probably the third represents more nearly the attitude toward which courts were tending in the latter part of the nineteenth century. The second and first have seemed to the common-law lawyer unthinkable. He has found it hard to conceive that a rule of statutory origin may be treated as a part of

the general body of the law. But already in 1908 it seemed to me that the course of legal development upon which we had entered had led us to the second method and must eventually lead us to the first. This prophecy was noted with disapproval in 1910 by Professor Holland of Oxford in the seventh edition of what was then the standard English book on jurisprudence. Comparing it with a pronouncement of the Chief Justice of Connecticut in terms of the fourth view, he said that as between the two the choice could hardly be given to legislation. Yet in the forty-odd years since Professor Holland's pronouncement my prophecy of 1907 has been fulfilled to no small extent. The effect of the Workmen's Compensation Act upon the common law of torts is already marked and significant.

But change of attitude toward statutes has been a slow process. If any piece of legislation has become universal in common-law jurisdictions it is Lord Campbell's Act or, as it is called, the Wrongful Death Statute. It certainly has been in force long enough to have been thoroughly incorporated in the law. Indeed, recovery for wrongful causing of death is not something confined to Anglo-American legislation. It was worked out by the civilians from Roman texts and is provided for in the modern codes. Yet the Supreme Court of the United States in 1907 thought of it as introducing a sort of temporary local innovation which was not at all to be thought of as on the same footing with common-law doctrines. In the same spirit the Supreme Court of Missouri had laid down that while every physical interference with the person of another short of killing is presumptively wrongful and calls for justification, a killing is not presumptively wrongful but, because it gave rise to no action at common law, must be shown to have been wrongful by the party complaining. As late as the present year, on the basis of pronouncements of the Supreme Court of the United States before the Workmen's Compensation Act and kindred statutes, it has been held that as the prior maritime law conferred no right on the personal representative of a deceased maritime employee to recover for his death, the cause of action in admiralty was given by the state law only.

A recent case holds that where a woman died as the result of using a drug advertised as a salt substitute an action on the Wrongful Death Statute would not lie. It was said that the personal representative does not have a cause of action for wrongful death based on an implied warranty of fitness. The death statute will support only actions *ex delicto,* based on negligence and intentional tort, but not actions *ex contractu.* The wrong "wrongful" was narrowly construed as covering only tort but not breach of implied warranty. Fortunately strong courts have rejected this, but that it could be held by a good court as late as 1951 must make us think.

In like manner the much discussed *Hitaffer* case, holding that a wife may sue for loss of consortium of her husband, is rejected by the weight of authority. The basis of rejection is that the wife had no such claim at common law and none has been given her by legislation. But this treats the Married Women's Acts as not part of the general law. Universal as they are, they are to be held, as to their effects, to have to do with remedies only, to be limited to what they specify, and not to be thought of as making a fundamental change in the position of married women before the law is to be taken into account whenever new questions arise as to their rights and duties. The *Hitaffer* case goes on the effect of the Married Women's Acts as general legislation upon the whole field of the rights of married women. The reasoning of the cases to the contrary was natural a century ago when the rule that statutes in derogation of the common law were to be strictly construed flourished. It is an anachronism today. The supposed rule as to strict construction of statutes in derogation of the common law was abrogated as to the code procedure by the New York Code of Civil Procedure in 1847. It was rejected more and more by the courts in the present century. Indeed, if adhered to it would make all social legislation futile.

Another sort of anachronism which ought not to wait for legislation to eliminate it may be seen in procedural distinctions, derived from the common-law actions, which have been widespread in procedure but still affect reasoning as to substantive rights. Obligations arising from office or calling are neither contractual nor delictal. At common law some could be enforced either in assumpsit or trespass on the case. In 1953 it is time to stop taking cases to appellate courts on a question whether liability of a carrier, where a woman passenger fell from an upper berth, for failure to provide a ladder for her to use in getting down, is *ex contractu* or *ex delicto*.

In view of recent legislation and the conditions of life in the society of today we must work out better theories of tort liability. And this may be done without infraction of any legitimate doctrine of stare decisis. Theories better adapted to an urban, industrial society in which life and limb are subjected to multiplying threats from mechanical devices, construction, and operations of every sort, will not deprive any one of a vested right to injure others. Nor will the finding and formulating of other bases of liability do away with the progress that culminated in the theory of liability on the ground of culpability — the moral ground of fault — which reached full development in the nineteenth century. Fault must remain as the basis of one type of liability. But the task is now presented to work out a satisfying theory, resting on experience developed by reason, for a great area of relations and conduct in which the humanitarian thinking of today calls for imposition of liability to make reparation where there has been nothing which may reasonably be

called fault. Here many grounds of liability have been proposed. One is the preventive function of liability — maintaining the general security by imposing liability upon enterprises or activities in which accidents and injuries are shown by experience to be numerous and inevitable, in order to impel those in control to exercise the greatest degree of vigilance and diligence to prevent or at least minimize accidents. Another is what used to be called the insurance theory of liability. It proceeds upon a humanitarian idea that we should all of us bear the losses incidental to life in civilized society and not leave them to be borne by the luckless victims of accidents. Hence it is said, liability to repair injuries should be imposed immediately upon enterprises and undertakings and persons able to bear them in the first instance who then may pass them on to all of us in charges for services rendered or goods manufactured or produced. This is an attractive theory making us feel that we are sharing the burdens of our fellow men without immediate drain upon our pocket books or adding to the burden of taxation. But as a practical matter, as I have shown on other occasions, the assumed ability of the person held to liability in the first instance to recoup himself by charges for services or prices for products is illusory. Substantially everywhere charges for service by public utilities are under the control of administrative boards and commissions. Also prices for manufactured products are likewise, especially in time of or after wars, fixed by administrative agencies. The extent of liability to repair injuries is fixed by verdicts of juries, the prices and charges out of which the person held subject to strict liability is to be recouped are fixed independently by administrative agencies. What either does or may do has no effect upon the other. The jury is likely to be sympathetic and fix a generous reparation. The administrative agencies will feel bound to exert themselves to keep rates and charges and prices to the consumer as low as possible. It is downright hypocrisy to assume that the ultimate burden is shifted to the consumer. In the case of the manufacturer, the prices he fixes, if not subject to administrative control, are held down by competition which is strictly maintained by courts and administrative agencies. Moreover, the insurance theory is used to relieve farmers from strict liability to make compensation for injuries to employees incident to the employment. In the formative era of our law large commercial farms employing hundreds of workers and using mechanized automotive equipment and all manner of mechanical tools and implements were not known. Such farms are well known today and the principle of the Workmen's Compensation Acts applies to them. But farm laborers are excluded from the statutes and the reason is said to be that the price of farm produce cannot be passed on to the ultimate consumer. One might say why not? Perhaps the real reason is that we have not had a class of agricultural laborers in America such as they have in Europe. The farmer of our formative era farmed his own farm. But large tracts cultivated by corporations or owners em-

ploying numbers of workers and large farms employing many transient workers at harvest time may well be differentiated if there proves to be a significant incidence of accidents in operating them. This would be a matter for legislation.

But much more is required in order to bring the administration of justice to its highest and most effective development than can be brought about in the course of judicial decision. The courts have chiefly to depend upon the arguments of counsel for information needed to exercise their power of finding the law so as effectively to develop experience by reason to meet the continually changing situations of fact which are before them. As things are today, much more in the way of research directed to the actual working of rules and doctrines in view of the social and economic order of the time than can be found in the text books or in the law reports, should be available to counsel who have to argue and judges who have to decide. Not the least item in a program of improvement of the law in action in America is establishment of ministries of justice, national and state. The Federal Department of Justice, as prosecuting bureau, a bureau for attending to Government civil litigation and for advice on the law to the agencies of Government, is not designed nor equipped for continuous well directed study of defects in the general course of operation of the system and how to cure them. Mr. Justice Cardozo pointed out in his paper on a ministry of justice that the courts do not get the help they ought to have from legislation and the legislators do not get the help which would enable them to furnish it.

Very generally today preparatory research in aid of the judicial rule-making power and of legislation upon matters which come before the courts is committed to judicial councils exercising an advisory function. Need of improvement of legal procedure was the immediate occasion of setting up these councils two decades ago. Some of them have been notably successful in achieving reforms through rules of court or statutes or both. In more than half of the states they are now actively at work on much more than procedure, although in many states that remains their primary concern. They are beginning to make thorough studies of questions of substantive law. But their means of information are usually limited to experience of judges and practitioners as to defects in the administration of justice due to inadequacy of procedure, inadequate or badly drafted statutes, and defects in the common law calling for legislation. Their field is limited and they have like problems as to information required for intelligent lawmaking with those which confront the legislature. For your purposes they can do little. Where procedural difficulties are encountered it may be worth while to enlist their aid for projects worked out by your committees on the basis of your experience.

For purposes of legislation in aid of the administration of justice, as

distinguished from political legislation, the lawmaker needs to be well informed as to gaps in the law which can best be supplied, or even only be supplied, by statute, and as to defects in the existing laws which require to be remedied by repealing or amendatory legislation. But this is not all. If legislation is to be effective, he must be well informed as to what is to be taken account of in drafting statutes whether supplying new law or amending old law. This means more than knowing the old law, appreciating the mischief to be met, and having an idea of a remedy. Much incidental information, often of a technical nature, is required in order to make sure that the remedy meets the mischief and does not create new mischiefs in its application. It means more also than provision for scientific drafting. Difficulties in the application of statutes often arise from careless drafting. But the most careful attention to the mechanics of drafting will not meet deficiencies in the substance of what is drafted. Much as has been done for American legislation by provisions for legislative counsel and for drafting bureaus, much still remains to be done.

What are the modes of informing the American lawmaker as to what he should know in preparation for effective legislation? These agencies of preparation are many and varied. They are both public and private, and characteristically in an Anglo-American polity, our chief reliance has been upon the private agencies. But these private agencies exist to take care of particular interests, and many things of serious import in the administration of justice fall down between them. The public agencies are not organized to look out for the administration of justice as a whole. Much escapes their notice or is outside of their immediate interest and so falls down between them or between them and the private agencies.

On the whole, first in effectiveness among the private agencies have been committees of professional, trade, and business associations. Some years ago, when a study of this subject was made, it was found that 115 such associations were active in the United States in preparing and promoting legislation. One third of these were national organizations promoting either congressional legislation or uniform state laws, or both. Nowadays, when we have given up the idea that the government governs best which governs least, and every activity is being subjected to regulation, it is inevitable and, indeed, eminently proper that every trade and business and calling should have its association, vigilant to protect its interests and should have its legislative committee with a budget of bills to urge at each session of the lawmaking bodies. The economic unification of the country is such that a minor change in a section of a statute, or what seems a minor change in administrative ruling may have the most serious, unanticipated consequences. Thus, to take an example which is not controversial, it was said a dozen years ago that "the change of a few cents in the freight rates on coal from Pennsylvania and West

Virginia has been universally recognized as one of the causes of a national crisis in the soft coal industry, a labor war, the rejection of two presidential appointees to the Interstate Commerce Commission, and the beginning of a factional battle in the United States Senate" which for a time threatened to undermine the most effective of our national administrative agencies. Such organizations are needed to insure that important economic interests are not destroyed or jeopardized by innocently drawn provisions for some one purpose the collateral effects of which are not foreseen by lawmakers uninformed as to the surroundings in which the statute will have to operate. But there is another side to this matter. Where proposed acts promoted by these organizations do not affect the interests of other like organizations and so, with organized pressure behind them, meet with no organized opposition, important defects in the law which ought to be remedied get but scanty correction or are left untouched. To take an example from the recent past which can involve no animosities today, when first there was an attempt to rid the important equitable remedy of interpleader of an incubus of historical limitations, the first remedial act, proceeding, one need not say, from an association of insurers, modernized the subject only for life insurance companies and fraternal benefit organizations. All other litigants were left to struggle with the old procedural difficulties. There was no organization or agency whose business it was to look after their interests. American legislation is full of examples of this.

Good work has been done by some of these organizations which have promoted useful legislation as to matters peculiarly within their knowledge and experience. This has been notably true of legislation for the reform of legal procedure, and for committing procedure to rules of court, promoted by the American Bar Association and by state bar associations and organized state bars. But, on the other hand, the suspicion which has not unnaturally come to attach to measures promoted by organizations has more than once stood in the way of adoption of much needed measures of reform drafted by bar associations.

Another type of private agency, namely, associations and other organizations interested in social and economic problems, has done notable service in drafting and promoting legislation. For examples one may refer to the National Conference on Social Work, the American Prison Association, the National Probation and Parole Association, the American Association for Labor Legislation, the National Consumers' League. But in some cases exclusive occupation with the subject of the association's immediate interest has led to provisions in the promoted legislation which failed to take account of related fields of the law or retained anomalies of which the law was being relieved in other connections. There is constant danger of this in remedial legislation today, and hence the more need of a public agency of general scope in which

the whole legal setting of proposed remedial measures may receive competent and adequate attention.

Much has been achieved also by another type of private agency which, while not primarily drafting or promoting legislation, has been at work upon our law as a whole, seeking to improve both its form and its substance, or to ascertain its exact workings with a view to ultimate improvement. The American Law Institute is outstanding in this category. Its restatements of important branches of the law must be the basis of any future codification and have led to important amendatory legislation in more than one state. Its Model Code of Criminal Procedure and Code of Evidence afford models for legislative lawmaking on significant features of our administration of justice and deal with procedure, as to which lawyers are peculiarly competent. Also every type of litigant is represented by lawyers drawn from every part of the country, and the danger of overlooking collateral consequences or particular interests is reduced to a minimum. But only large, nation-wide questions are dealt with in this way. A multitude of local defects in the administration of justice are likely to be left untouched.

Another valuable private agency of preparation for legislation is to be seen in research carried on in universities and institutes. In this connection, the Institute of Law of The Johns Hopkins University was noteworthy. It was a misfortune that the work of this Institute, which was doing much toward investigation of the actual working and social effects of American administration of justice, had to be discontinued. Mention should be made also of the Institute of Human Relations at Yale, and the work going on in legal research at the University of Michigan.

Looking back over these private agencies of preparation for legislation, we cannot but see that valuable as their work has been, on the whole, they are wanting in generality of scope, their work lacks continuity, and too many of them are subject to unjust but natural suspicion from the fact of their being private agencies, and that this suspicion has stood in the way of adoption of many useful measures which they have advocated. A public agency organized to make effective use of what they propose would greatly enhance their usefulness.

Of the public agencies of preparation for legislation, the oldest and longest continued is hearings before legislative committees and examination of witnesses with respect to pending or contemplated bills. But this agency of preparation is chiefly adapted to what may be called political legislation. Hearings during a busy legislative session, usually in case of state legislatures limited in duration, is no longer adequate for the everyday purposes of keeping the administration of justice abreast of its tasks and informed of the progress of science. When sub-

jects of exceptional public interest are being urged it is usually the practice to set up a special commission to study them and make a report to the executive or to the legislature directly. But this, again, does not reach matters which affect the individual litigant as to which defects exist or the progress of science has developed special knowledge which should be available to courts or should be brought to the attention of legislators with a view to remedial legislation. Moreover, there is no continuity in the work of these commissions and the limited scope of their inquiries and their limited facilities for research preclude them from doing what is required today except for particular matters chiefly of political interest. Some states have set up legislative councils, which do useful work in keeping the statute book in order, looking out for inconsistencies, confusion, and amendments which leave the legislation on some particular point in a state of uncertainty. But here, too, there is no provision for informing the lawmakers of defects in the general body of the law needing remedial legislation and of what is required to be known in devising and formulating remedies. Legislative reference bureaus which exist in some states come nearer to what is required. But they can do little more than refer legislators or legislative committees to the books in the state or the bureau library in which pertinent information may be found.

Where purely legal questions are involved, doing away with local anomalies, bringing commercial law into accord with business practice, and eliminating local rules inconsistent with the economic unification of the country, which has gone on so rapidly for a generation, the National Conference of Commissioners on Uniform State Laws has done work of the first importance. But here, too, the scope of the Conference is limited, and a body of lawyers, meeting once a year, is not adapted to a general task of keeping the law abreast of the progress of scientific knowledge. Judicial councils which now exist in twenty-nine states have been considered above. Conferences under public authority should also be mentioned. In this category are the Conference of Governors, the Federal Conference of Senior Circuit Judges, the Conference of Attorneys General, and the judicial conferences and conferences of district attorneys held in many states at the time of meeting of the state bar association or state bar.

Of another type there is research carried on in administrative departments directed to the particular problems of these departments.

Reviewing the work of these public agencies of preparation for legislation, it will be seen (1) that it lacks continuity; (2) that it lacks coordination, no one of them, as a rule, knowing what the others have done or are doing; (3) that the different agencies are limited in scope and often limited in facilities, so that much that ought to be done falls

down between them; and (4) that none of them is adapted to making available the progress of scientific knowledge to those who ought to be kept abreast of it. So far as something of the sort is achieved, it is only with respect to the social sciences. This gap as to the sciences and the lack of continuity and coordination and failure to cover the whole field of the administration of justice explain much that is unsatisfactory in the work of our courts today.

It may be asked why cannot the courts do at least a great part of what is needed? To this there are three answers. One is the limitations and difficulties as to judicial notice. More than fifty pages of volume nine of the last edition of Wigmore on Evidence are devoted to that subject and bring out the difficulties involved very clearly. Another is that, as Mr. Justice Holmes well put it, creative judicial lawmaking must be "interstitial only." It applies an authoritative technique to authoritative legal materials. But there are times and places where new authoritative materials to be developed by judicial decision are called for, and these must come in through legislation. Thirdly, the appellate courts today have crowded dockets. They are oppressed with work far beyond what was true in the formative era of our legal polity, and the mass of strictly legal material which they have to consider in passing upon any but the simplest cases has become enormous. Moreover, they are not organized and equipped to conduct the sort of research which is called for, nor may we reasonably expect this of them.

As far back as 1823, Bentham, the founder of the science of legislation in the English-speaking world, urged a ministry of justice. He saw that even then preparation had to go before wise lawmaking on matters involving adjustment of relations and ordering of conduct, and that no systematic provision for such preparation was made in the English polity. Later, Lord Westbury, one of the leaders in the legislative reform movement in English law in the nineteenth century, urged that there should be, as he put it, machinery for ascertaining "how the law is worked." He complained that there was no body with a duty of seeing "how far the law is fitted to the exigencies of society, the necessities of the times, the growth of wealth, and the progress of mankind." He pointed out that important questions often remained long unsettled, leaving the law in doubt and uncertainty, until some remarkable case arose and the necessary remedial legislation followed. Later, Sir Frederick Pollock, speaking of English commercial law of fifty years ago, said that business men "walk every day upon a road strewn with open pitfalls, which remain open, merely because it is nobody's business, until the mischief is done, to see that they are filled up." The most we can say, he went on, is that when some one does fall into a hole in the legal highway, he can reflect that probably it will be so repaired that in time to come no other man will fall into the same hole, or at least not in the same way. In 1918, the re-

port of Lord Haldane's Committee on the Machinery of Government called attention to the difficulty of getting the attention of the cabinet, which in the British polity has a large measure of control over what shall come before Parliament, for measures of improving the law, and pointed out that no one was responsible for seeing to it that defects in the administration of justice were discovered and that there was appropriate remedial legislation. Out of this grew the Law Revision Committee which was doing notable work in England down to the outbreak of the second World War.

In the United States, I urged a ministry of justice in an address in 1916, and again in 1917, before the American Bar Association. In 1921, the matter was taken up vigorously by Mr. Justice Cardozo who urged it zealously thereafter. He explained that the need of such an institution had been driven home to him "with steadily growing force" through his work in appellate courts. His experience showed that for ordinary cases the judges were constrained by rules which were beyond their power to alter or abrogate while the legislature, which had the power, was "occupied with issues more clamorous" than the rights of ordinary litigants and took no steps to provide a remedy. He pointed out that where the interests specially entrusted to some administrative department were affected there was another story. For example, any defect in the tax laws, affecting the government, was at once brought to the attention of the legislature with a proposal for amendment. "Seeing these things," he said, "I have marveled and lamented that the great fields of private law, where justice is distributed between man and man, should be left without a caretaker. A word would bring relief. There is nobody to bring it."

What stands in the way of establishing an institution so obviously needed? For one thing, I suppose, it is out of line with the genius of English-speaking peoples. We characteristically rely upon spontaneous individual effort, and our instinct has been to confide no more than a necessary minimum to official agencies. But the exigencies of change from a rural, agricultural to an urban, industrial society have been driving us to give up, or at least modify, our traditional repugnance to bureaus and public agencies. Again, Lord Birkenhead in England urged that the work of such a ministry would be vitiated by politics, and that it could achieve little without the confidence of the public. Here, too, however, we have been having to learn something about public agencies. Administrative agencies with large powers have been set up on every hand. There is a growing insistence that they be kept out of politics, and there is no good reason why we cannot do for a ministry of justice what we now see must be done for bureaus and boards and commissions generally.

Objection has been made in this country on the basis of unfortunate experience of the Ministry of Justice in France recently in connection with the Stavisky scandals. But in France the judges are part of the administrative hierarchy, and the Minister of Justice, on that side of the work of the Ministry, is head of the judicial system. This is not what a ministry of justice would mean under our constitutional system nor elsewhere in the English-speaking world where the independence of the judiciary is a cardinal tenet. No English or American lawyer would for a moment think of advocating subordination of the judiciary in this fashion. Proposals for advising the legislature of needed laws to meet gaps in the law or defects in the administration of justice and to meet difficulties developed in the course of the work of the courts; for study of how laws and legal precepts and doctrines function and the effects in action of particular legal precepts and doctrines; for making available promptly and in such wise that it may be utilized intelligently the best and most authentic of what is continually being added to the stock of human knowledge by the progress of the sciences; for investigation of what hinders better performance of the tasks of the courts and how to make that performance more effective for its purpose — all this is a wholly different matter.

I urged upon you, then, advocating a ministry of justice both as a means of insuring that measures obstructive of the due course of justice are not pushed quietly through legislatures without opportunity to present their effect to committees or either house or the executive, but no less as furnishing a strong aid to the good measures you will be advocating for which if they are well thought out and prepared the indorsement of the Ministry can be secured. When adverse measures are introduced in the legislature a hearing before the ministry will be an effective aid to your opposition. A ministry of justice would be a powerful reinforcement in procuring much needed legislative improvements in all jursdictions, and, as Mr. Justice Cardozo pointed out, a much needed aid to the courts.

WORKMEN'S COMPENSATION IN MISSISSIPPI: THE FIRST FIVE YEARS†

*Arthur Larson**

In the short space of five years, Mississippi, the last state to adopt a workmen's compensation act, has achieved a first-rank position in the opinion of compensation law observers. It has earned this remarkable distinction in several ways.

The Mississippi workmen's compensation statute, with the one exception of its omission of occupational disease coverage, is one of the best compensation statutes in the country. It has adopted most of the good features of the best statutes of the different states, and at the same time has avoided most of the bad features that other statutes have inherited from earlier times. It is comparatively short and simple, and yet it contains practically all of the provisions which are considered essential in a good modern statute, such as allowances for rehabilitation and disfigurement, second injury fund, and the like.

The quality of judicial interpretation of the act has been of the very highest. In a short time, the Supreme Court of Mississippi has filled in a surprisingly large part of the area in which judicial construction is necessary. It has done this by making the most of the cases presented to it; that is, it has on each occasion provided a systematic analysis of the area involved, and has met extremely troublesome issues squarely and without evasion. Its opinions leave no doubt where the court stands on each of the controversies presented. Fortunately, conflicting views within the court have been ably set forth on both sides, and yet, as soon as the majority has made a final disposition of a point, the dissenting judges have gracefully accepted the majority view as established doctrine, and have proceeded to build future decisions upon this acknowledged foundation.

The system of compensation administration adopted by Mississippi appears to be an excellent one. Such features as the direct payment method, in which the employer or carrier is obliged to start making payments without any formal preliminaries, the provision of a full time well balanced commission, and the issuance of a concise and simple set of rules and regulations by the commission, indicate an awareness of the fact, which becomes daily more evident, that achievement of efficient compensation administration is just as important as the proper drafting and interpretation of the substantive law.

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The program of keeping the bar informed on compensation matters is not the least of Mississippi's achievements. Such institutes as the present Eighth Annual Mississippi Law Institute are an important contribution to this continuing education program. In addition, the provision of a special volume of workmen's compensation cases decided by the Supreme Court of Mississippi[1] and the publication of the administrative decisions of the commission and the attorney referees,[2] complete with digests and indices, give the practicing lawyer an opportunity to keep informed of the progress, both judicial and administrative, of compensation law in Mississippi with the maximum of convenience.

In short, Mississippi waited a long time for a workmen's compensation system, but what it got was well worth waiting for.

Why Every Lawyer Should Know Compensation Law

It is a mistake to suppose that workmen's compensation law is so much a specialty that it is of interest only to lawyers who are particularly concerned with representing compensation claimants and defendants.

The first reason why every lawyer should have a working knowledge of compensation law is that he should be willing and prepared to handle such cases when they come his way. This is an enormous field of practice. It has been said that there are 100,000 litigated cases a year.[3] Some lawyers are all too prone to refer compensation cases to acknowledged specialists, when, with a little self-education, they could soon learn to handle such cases themselves with enough efficiency to make this class of practice profitable. In any event, even if the occasional case does not appear to be profitable, is there not a duty on every lawyer to come to the aid of the injured person who believes he has a just claim which requires legal representation?

However, even if a lawyer never handles a compensation case, he still must know compensation law if he deals with any phase of personal injury litigation. The reason is that, in a large proportion of cases, the availability and disposition of a damage suit turns upon principles of workmen's compensation law. There are four principal ways in which this happens: (1) the exclusive-remedy clause[4] of the compensation act will control the question of whether the injured man or his dependents and relatives may have a tort suit against the employer; (2) the third-

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[1]MISSISSIPPI WORKMEN'S COMPENSATION CASES (1953). A compilation of all of the decisions of the Mississippi Supreme Court on workmen's compensation to date, which was distributed by the West Publishing Company at the Institute.

[2]MISSISSIPPI WORKMEN'S COMPENSATION COMMISSION ADMINISTRATIVE DECISIONS.

[3]10 N.A.C.C.A. L.J. 29 (1952).

[4]MISS. CODE § 6998-05 (1942).

party-action provision[5] of the compensation act will control the nature of the suit by the employee, his dependents, his employer, or the compensation carrier, against a third party tortfeasor who caused or contributed to a compensable injury; (3) the compensation act will control the incidence of possible tort suits against the employer who has failed to secure payment of compensation as required by statute;[6] (4) compensation law will control the question of whether a state compensation act, or damage action under the Federal Employers' Liability Act or the Jones Act will lie in a particular case.

To illustrate this point, let us suppose that you are a general practitioner, who handles personal injury cases but not workmen's compensation claims, and there comes into your office a man with an injury that has paralyzed him from the waist down. He tells you that his job is that of sweeping out the car barns of a streetcar company. He was riding to work, on a free pass, on one of the company's streetcars when, due to the combined negligence of the streetcar conductor and the driver of a beer truck belonging to a local brewery, there was a collision in which he was injured. He was treated by a local physician, who aggravated his injury by malpractice. The injured man's wife is with him, and she adds the fact that her husband is no longer capable of marital relations. The streetcar company has already paid some workmen's compensation.

In this set of facts, there are at least a dozen potential causes of action in tort: (1) Employee v. Streetcar Company; (2) Employee v. Brewery Company; (3) Employee v. Operator of Streetcar; (4) Employee v. Operator of Truck; (5) Wife v. Streetcar Car Company for loss of consortium; (6) Wife v. Operator of Streetcar for same; (7) Employer as as subrogee v. Brewery Company; (8) Employer as subrogee v. Operator of Streetcar; (9) Employer as subrogee v. Driver of Truck; (10) The Brewer (if it is sued by employee) v. Streetcar Company for reimbursement; (11) Employee v. Physician for malpractice; (12) Employer v. Physician for malpractice. One could go on to add a number of others, but the striking fact is *that the initial availability of all these tort causes of action depends, not on tort law, but on provisions and interpretations of the Workmen's Compensation Act.*

A large part of workmen's compensation law is made, not in compensation cases, but in tort suits as they are affected by the exclusive-remedy clause. In other words, before the lawyer knows whether he has a tort suit, he may have to ask all the complicated questions about existence of "accidental injury," "arising out of and in the course of em-

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[5]Miss. Code § 6998-36 (1942).
[6]See note 4 *supra*.

ployment" and "employee status," since he will have a tort cause of action only if the case falls outside the tests of compensation coverage in one of these respects or in some other way. The interesting thing about these cases is that the positions of the parties are reversed, for it is the plaintiff and the plaintiff's lawyer who, in order to obtain the more attractive damage recovery, will be found pleading for a narrow construction of the compensation act, while defendant and his attorney find themselves in the unfamiliar position of pleading for the broadest possible construction of the act.

The third-party statute also produces much compensation law in tort cases. For example, in *American Creosote Works v. Harp*,[7] in which the consignee's employee was injured due to the alleged negligence of the consignor in loading coals on a car, the lawyers for both sides, in an action by the employer against the consignor, had to be familiar with the third-party statute. Fortunately, Mississippi has an excellent third-party provision which requires a minimum of interpretation. Under it the employee may sue the negligent third party while collecting compensation, and the employer or insurer, having paid compensation, may also sue the third party. Provision is made for notice by the employee to the employer, or vice versa, who may join in the action; but if the employer or the insurer do not join, it was held in the *Harp* case that this is not error in the form of non-joinder of necessary parties. Ordinarily, if the recovery from the third person exceeds the amount of compensation plus reasonable costs of collection, the excess is paid to the employee. But, in the third party action, it is error to introduce evidence on the amount of compensation received by the employee, since the compensation arrangements between employer and employee are no concern of the third party tort feasor, whose liability remains undisturbed.[8]

"Accidental Injury" and Disease

As we start through the Mississippi compensation law, almost the first item we encounter is the basic coverage clause, which is responsible for perhaps half of the interpretative cases: " 'Injury' means accidental injury or accidental death arising out of and in the course of employment. . . . "[9] It was probably wise, on the part of the legislature, to leave the interpretation of the phrase "accidental injury" to the courts, instead of attempting to spell out in detail the particular kinds of injuries and diseases covered.

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[7]215 Miss. 5, 60 So.2d 514 (1952).
[8]Coker v. Five-Two Taxi Service, Inc., 211 Miss. 820, 52 So2d 835 (1951).
[9]Miss. Code § 6998-02 (1942).

Since the phrase was used in the first British act, it has been receiving a broader and broader construction as the years have gone by. It is quite arguable that the original draftsman of forty or fifty years ago intended the phrase to refer to typical traumatic injuries and "accidents" in the popular sense. However that may be, when a legislature in the year 1948 adopts the phrase, it must be assumed to attach to it, not the meaning associated with it in 1912, but the meaning it has generally come to acquire by the year 1948. The Supreme Court of Mississippi, therefore, has quite properly interpreted the term "accidental injury" according to the broad modern concept under which it includes any harmful change in the body, whether that change takes the form of obvious trauma, or some more general condition such as disease.[10] The status of "disease" in compensation law falls under five main headings.

Disease Following upon Injury. This is the least controversial category. If a man suffers a violent blow on the chest, and, as a direct result develops pneumonia, there is no difficulty in finding the pneumonia compensable. Some statutes explicitly include disease following upon injury, but even where, as in Mississippi, this is not done, the disease is clearly compensable on the fundamental principle that the compensable injury includes all conditions that are the natural and direct result of the original injury.

Pre-existing Disease (or other condition) Aggravated by Employment. It has been clearly and definitely settled in Mississippi, as in almost every jurisdiction, that a condition is no less compensable because it was in part the result of a pre-existing infirmity or disease. In the recent case of *Cowart v. Pearl River Tung Co.*,[11] the pre-existing condition was high blood pressure. The decedent's act of bending over to pick up tung nuts was, according to the medical testimony, a contributing factor in causing the rupture of a blood vessel of the brain, and this was held sufficient to make the death compensable. There is no weighing of the relative contribution of the inherent weakness and the employment activity in such cases, since the employment need not be the primary cause but need only be a concurrent cause. Thus, (if it were possible to speak in such terms) the death would be compensable even if the high blood pressure were ninety-five percent responsible and the act of stooping were only five percent responsible.

Of course, in such cases, there is frequently a serious question of medical fact; thus, in the earlier case of *Thornton v. Magnolia Textiles*,[12] the claim failed because the court accepted the commission's finding of fact that the fall did not aggravate the employee's cancer. Even in the

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[10]Hardin's Bakeries, Inc. v. Ranager, 64 So.2d 705 (Miss. 1953).
[11]67 So.2d 356 (Miss. 1953).
[12]55 So.2d 172 (Miss. 1951).

Cowart case, it was a very close question whether there was sufficient conflict in the medical testimony to make the commission's denial conclusive. The court found that the one doctor's testimony positively supported the theory that the exertion contributed to the death, while the other doctor's testimony at least admitted of this possibility; on this record, the court held that there was no conflict on the basic legal question whether the employment made *some* contribution, and that it was therefore entitled to reverse the commission's denial.

Infectious Diseases "Accidentally" Acquired. The major hurdle to get over in this class of cases is the relatively elementary question of whether a "disease" is an "injury." *Hardin's Bakeries v. Ranager*[13] has decisively settled this question by adopting the view that the term "injury" includes diseases and other harmful conditions such as, in that particular case, a dermatitis or rash resulting from wearing a particular kind of baker's mitten. There need not be the application of external violence or force.

Once it is settled that diseases and similar conditions are "injuries," what is necessary in order to give them "accidental" quality? At one time it was thought that there might have to be some extraordinary event, such as contracting tuberculosis because a co-employee sneezed directly into the claimant's face,[14] or acquiring infection through some "abnormal" channel of entry such as a scratch or lesion. More recently, it is generally being held that the unexpected impact of the germs themselves, even through "normal channels of entry" may be deemed accidental.[15] The Mississippi court appears to adopt this view, since it quotes with approval such statements as the following: "From the standpoint of pure reason, whether bodily injury which produces a weakening or disintegration of the physical system is caused by flying germs or by flying shrapnel or by a poisoned arrow or by the sting of an insect is only a matter of degree as to the size or quality of the missile or instrumentality inflicting the injury."[16]

Diseases of Exposure. This group includes various diseases and conditions resulting not from direct infection, but from exposure to cold, heat, irritants, fumes, dust, and the like, or from exertion or strain. Having gotten over the hurdle of including diseases within the term "injury," we meet in this category a second hurdle: The question whether the lack of unusualness or suddenness deprives the injury of accidental quality.

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[13]See note 10 *supra*.

[14]Compensation was awarded in a case involving similar facts in MacRae v. Unemployment Compensation Commission of North Carolina, 217 N.C. 769, 9 N.E.2d 595 (1940).

[15]1 Larson, Workmen's Compensation Law § 40.30 (1952).

[16]Moore v. Fidelity & Casualty Co., 203 Cal. 465, 471, 265 Pac. 207, 209 (1928), quoted in Hardin's Bakeries, Inc. v. Ranager, 64 So.2d 705 (Miss. 1953).

The "unusualness" issue opens up the entire question of whether usual exposure or exertion resulting in an unexpected disease such as pneumonia or other condition, such as coronary thrombosis, is accidental. This problem has caused, and is continuing to cause, a tremendous amount of consternation and litigation in other jurisdictions, so far with inconclusive results. Mississippi appears to have settled a considerable part of the controversial area in the *Cowart* case.[17] The exertion of picking nuts was certainly the usual exertion of the decedent. The court appears to adopt the theory that there is sufficient accidental quality if the result is unexpected, even though the cause is a normal and routine activity.

This does not entirely settle the problem however. The injury in the *Cowart* case took the form of a very obvious rupture. There are some jurisdictions which have found compensability in such cases which still hesitate to make awards when usual exertion leads to some more generalized result, particularly coronary thrombosis. New York, for example, makes awards for usual exertion leading to cerebral hemorrhage,[18] but theoretically requires unusual exertion in the case of coronary thrombosis.[19] The distinction is practically impossible to defend in theory, and almost equally impossible to administer in practice. Mississippi has upheld an award for coronary occlusion in *La Dew v. La Borde*,[20] with no discussion of usualness versus unusualness of exertion, although on the facts the workman had just helped two other employees lift a 1000 pound pipe. On the other hand, in an earlier heart case, a denial of compensation was upheld when the heart attack was allegedly due to cumulative tensions and exertions connected with the work.[21] There was also *Ingalls Shipbuilding Corporation v. Byrd*,[22] in which the usual vibration associated with the workman's job, coupled with a pre-existing congenital malformation of blood vessels, produced a compensable thrombosis.

The Supreme Court of Mississippi has not as yet, however, had to meet the simple type of case which has caused the most difficulty, that of the man who suffers a coronary thrombosis while lifting the 200 pound sacks that he normally lifts day in and day out as a regular job. There is certainly plenty of language in the *Ingalls Shipbuilding Corporation* case to form a theoretical foundation for compensability in such a case. The difficulty in other jurisdictions has been, not conceptual, but prac-

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[17]See note 11 *supra*.

[18]Kayser v. Eric County Highway Department, 276 App. Div. 789, 92 N.Y.S.2d 612 (1949).

[19]Furtado v. American Export Airlines, Inc., 274 App. Div. 954, 83 N.Y.S. 2d 745 (1948), *rehearing denied*, 298 N.Y. 933, 83 N.E. 2d 866 (1949).

[20]216 Miss. 598, 63 So.2d 56 (1953).

[21]Fischer v. Gloster Lumber & Builders Supply Co., 57 So.2d 871 (Miss. 1952).

[22]215 Miss. 234, 60 So.2d 645 (1952).

tical, in that there has been genuine concern lest industry be ultimately saddled with the cost of all heart failures during working hours, and perhaps even after. It is suggested that the proper way to keep this class of cases within bounds is not the usual-unusual exertion distinction, which on reflection will be seen to have no logical connection with the concept of "accident," but rather through insistence on really satisfactory medical evidence of an actual causal connection between the exertion or exposure and the final injury.

As to the "suddenness" issue: it has been clearly settled in Mississippi that this element is not inherent in the concept of "accidental injury." The gradual acquisition of a dermatitis by a baker is an accidental injury,[23] as is a thrombosis caused by the repeated impacts and jarring resulting from the use of a power-driven chisel.[24] Mississippi is fortunate in that its draftsmen used the phrase "accidental injury" instead of the more ambiguous phrase "injury by accident." Under the latter phrase, there has frequently been a regrettable tendency to look for "the accident" which in turn gave impetus to the mistaken notion that the injury must be immediate, sudden, or confined to a very short space of time. The Mississippi phrase, "accidental injury," contains nothing whatever to suggest that the injury must be instantaneous or sudden; the accidental quality is sufficiently supplied by the unexpectedness or unintendedness of the event. Of course, there is a practical reason for wanting to identify the time of the injury, since some point must be fixed for such purposes as starting the notice and claim periods. But this point can be fixed, as was said in the *Hardin Bakeries* case, by taking the time of disability as the crucial moment for such purposes.

Occupational Diseases. It seems to be taken for granted in Mississippi that occupational diseases are not covered. In the *Hardin* case, for example, the court discusses the issue whether the dermatitis was an accidental injury or an occupational disease, the inference being that if it had been an occupational disease it would not have been compensable.

The thing that distinguishes the occupational disease from all other diseases so far discussed is that it lacks the one final requisite of unexpectedness. Both the cause (the normal or at least typical conditions of the industry) and the result (a disease or condition associated with long exposure to these conditions) are in a sense expectable, and therefore not truly accidental. If it were not for the "accidental" requirement, such diseases could be judicially held to be covered as happened in Massachusetts under the simple word "injury."[25] But it would be

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[23]See note 10 *supra*.
[24]See note 22 *supra*.
[25]Hurle's Case, 217 Mass. 223, 104 N.E. 336 (1914).

stretching the term "accidental injury" to the breaking point to make it include occupational diseases.

In the *Hardin* case the baker's dermatitis was distinguished from occupational disease because it was not typical and not expectable, particularly in view of the fact that it was the result of an individual allergy in this employee.

It is a little difficult for an observer to understand why, at the time when Mississippi adopted such an advanced and modern compensation statute, it chose to omit occupational disease coverage. There remain only five other states lacking such coverage. It is to be hoped that such a statute will be forthcoming soon, and that when it is passed, Mississippi will adopt a type of occupational disease coverage which, in completeness and modernity, matches its compensation statute. This means that the fragmentary type of coverage should be avoided, since the naming of individual diseases leads to endless quibbling about whether particular conditions come within the definition or not, and also leaves uncovered many unusual or recently discovered conditions, sometimes of the most appalling character. Such a statute should also avoid the practice of imposing unusually low limitations on benefits or unusual restrictions for particular diseases. There was a time when these measures were justifiable in the case, for example, of silicosis. The improvement of industrial hygiene and safety measures, however, should by now have brought matters to the point where occupational diseases can be handled on the same terms as any other disability.

To maintain the preeminent position it has already established in other compensation areas, Mississippi should enact such an occupational disease statute without delay. As George Ade said: "Never put off until tomorrow what should have been done in the early seventies."

Course of Employment

Can the employee of a ginning firm be in the course of employment for the firm while putting up political signs for one of the partners who is running for sheriff? Can a bookkeeper who customarily did some work at home be in the course of employment when, after getting into her night clothes, she moved her husband's shotgun from a couch preparatory to working on the books? Can a laundry route man be in the course of employment when he calls at a house for the dual purpose of collecting drycleaning and committing adultery with the housewife?[26] Unless one has carefully followed the evolution and broadening of the concept of the course of employment over the past forty years, it is only

[26]This case, which finally turned on the arising-out-of-employment issue, is discussed in the next section.

natural to react to these questions by saying that it is preposterous to suppose that any one of them comes close to being within the course of employment; yet the first two were held compensable in Mississippi, and the last missed coverage by a hair's breadth.

Perhaps one may be permitted to observe, parenthetically, that there is a certain element of luck in the splendid and interesting opinions so far turned out by the Supreme Court of Mississippi, in that the court has been presented with some of the most fascinating combinations of fact in the history of compensation law—real collector's items.

Two, and perhaps three, of these cases have a common thread, the dual purpose problem. In the case of the bookkeeper,[27] the final award is not difficult to follow if it is taken one step at a time. Step number one is to recognize that the home was a regular workshop of this bookkeeper and that even this exact couch and table was the usual place where the work was done. The second step is simply to ask: If an identical accident had happened at the filling station, would it have been compensable? The answer is clearly yes. There only remains the argument that in moving the gun from the couch, the woman was acting in her capacity as housekeeper rather than in her capacity as bookkeeper. The reply to this is that, even if the act was in part motivated by a housekeeper's desire to tidy up the place, there was at least a concurrent motive of clearing away an obstacle to the performance of the claimant's usual work in the usual place. Under the dual purpose doctrine, it is sufficient if the employment was at least a concurrent cause for the particular act or trip.

In *National Surety Corporation v. Kemp*[28] the Mississippi Supreme Court had to deal with one of the most awkward cases yet to appear on the question whether acts directed by an employer for his private benefit are within the course of employment. The employer was a partnership engaged in ginning. In order to employ and retain this particular employee, who had special training, the employer had to promise him work and pay the year round; but there was ginning work only about seven months of the year. The agreement was, therefore, that he would perform such tasks as the partners directed for the remaining time, the work being largely miscellaneous jobs around the farms owned by the two individual partners. One of the partners was running for sheriff, and directed the employee to climb a pole to put up a political sign. In the process the employee came in contact with a power line and was injured. It is difficult to imagine an activity much more remote from

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[27]Joe Ready's Shell Station & Cafe v. Ready, 65 So.2d 268 (Miss. 1953), 25 Miss. L.J. 79. (5 to 4 decision).

[28]64 So.2d 723, *suggestion of error overruled,* 65 So.2d 840 (Miss. 1953), 25 Miss. L.J. 79.

the kind of business which the employer was in and which the insurer was insuring; yet both the employer and the insurer were held liable for compensation. The reasoning as to the employer can be put quite simply. It is within the power of the employer to enlarge the course of employment, acting through a person in authority. By directing this employee to do this job, the partner brought it within the course of employment, however unusual the activity might be. By the process of elimination, it can be seen that no other conclusion is possible. The man was not an employee of the individual partner, since the individual partner was not paying him or relying on any such relation; he was relying on the agreement that the employee would do such jobs as the partners directed. Any other result would be unconscionable from the employee's point of view. Under the opposite holding, if he complied with the order and was injured, he would lose compensation. If he refused to do the work, he would probably be discharged. And who would fire him? Not the individual, since the individual did not hire him or pay him. It would have to be the firm that fired him.

The question of the insurer's liability is even closer, but this can be settled by a straightforward application of the "full coverage" clause of the Mississippi statute which provides that the insurance policy shall be construed to grant "full coverage of all liability of the assured."[29] Given its most obvious meaning, this means that whenever the employer is liable the insurer is equally liable, and the Mississippi court so held. There remains a possible additional question of whether, once the insurer has paid, it might have a recovery over against the employer for engaging in activities completely unrelated to those specified by the parties in the contract of insurance, but this question was not before the court.

Arising Out of the Employment

Mississippi has disposed decisively of several of the most important questions involving causal relation between the employment and the injury, particularly in the realm of assaults.

The non-participating victim of horseplay has definitely been held protected. This is in line with the overwhelming trend of modern cases. In *Miles & Sons v. Myatt*,[30] there was a typical horseplay incident. One of the claimant's friends came up to him and said, "I feel rough this morning. I believe I'll take you apart," whereupon he picked up the claimant, squeezed him as if to break his back, and then let him down in such a way as to injure claimant's leg. It has long been recognized that

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[29]Miss. Code § 6998-39 (a) (1942).
[30]215 Miss. 589, 61 So.2d 390 (1952).

incidents of this character are part of the normal employment environment, and must be recognized as one of the regular risks of employment.

As to malicious assault, the Mississippi Supreme Court was confronted with a somewhat closer type of case in *Mutual Implement & Hardware Ins. Co. v. Pittman.*[31] While waiting for a batch of cement to be mixed, a co-employee threw an empty cigarette package at claimant. Claimant then playfully threw a small pebble at the co-employee and turned his back. At this point the co-employee brought down a shovel on claimant's head with all his force, causing a serious and permanent brain injury. It will be noted that the difficulty here lies in the absence of any obvious connection between the employment and the motivation for the assault. There was no argument about the work nor was the work of a character which increased the risk of assault. The award, if it was to be justified, required the court to accept the so-called "friction and strain" theory often associated with the opinion of Justice Rutledge in *Hartford Accident & Indemnity Co. v. Cardillo.*[32] That theory, in simplest terms, is this: The employment may contribute to an assault merely by requiring the enforced and continuous contact between human beings of varying degrees of unstable temper. If this enforced contact, attributable to the employment exclusively, causes some co-employee's temper to snap, this is analogous to the breaking of machinery in the employment environment. The Mississippi court did indeed accept this position, and upheld an award.

It should be carefully noted that this award does not mean that attacks based on personal hatred or animosity are necessarily compensable. If the animosity is imported from the parties' outside life, as where the source of trouble is some domestic quarrel, the choice of the employment premises for the attack will not bring it within the course of employment. Nor is it enough that the employment merely provided the acquaintance between the parties, if the assault actually grew, not out of the frictions and strains of employment, but out of some private relationship struck up between the parties. For example, in *Cyrus v. Miller Tire Service,*[33] a quarrel developed between two employees during the lunch interval because the one thought the other had short-changed him when buying him a package of cigarettes. It is important to note the distinction between this type of case and the *Pittman* case, since here the employment provided nothing more than the bare acquaintance. The parties then embarked upon a completely independent transaction, the purchase of the cigarettes, and in the course of that venture worked up a quarrel which proved to be fatal.

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31 214 Miss. 823, 59 So.2d 547 (1952).
32 72 App. D.C. 52, 112 F.2d 11, *cert. denied,* 310 U.S. 649 (1940).
33 208 S.C. 545, 38 S.E.2d 761 (1946).

There remains for consideration the most famous compensation case yet to emerge from Mississippi, that of *Brookhaven Steam Laundry v. Watts*.[34] This is the case of the laundry route man who became acquainted with one of the housewives on his route, and according to the testimony of the housewife, was quite regularly engaged in adultery with her on the occasion of his twice-a-week calls. The arrangement was that she would place a suit of her husband's clothes on the porch as a signal that the coast was clear. The important thing to note is that, on these occasions, the deceased did in fact carry away the laundry or dry cleaning, thus satisfying the dual-purpose test of "course of employment." On the fatal morning, decedent was standing on the porch talking to the housewife when the husband appeared from the interior of the house and said, "Well, I caught y'all," and shot the decedent. On the first appeal, the Mississippi Supreme Court affirmed an award in favor of the widow of the laudryman, but on a suggestion of error, the previous decision was replaced by a decision reversing the award. On both occasions, there were written majority and dissenting opinions of a very high standard of quality and thoroughness, and it requires considerable hardiness to attempt a critique of this set of cases in a short space of time.

The ultimate question is one of causal connection. This in turn involves the "positional-risk" doctrine which is exhaustively discussed in the first opinion. In substance, the first majority opinion says that this case is comparable to those in which an employee is brought to the place of injury by his employment and there is injured by some such thing as a stray bullet, a flying beetle, a mad dog, or a roving lunatic. The recent New Jersey case of *Gargiulo v. Gargiulo*[35] provides a classic illustration of the positional-risk theory. There a butcher's helper was returning from dumping trash in the back yard when he was struck in the eye by an arrow that had been shot by a child somewhere in the neighborhood, and an award was upheld on the positional-risk theory. The *Brookhaven* case, however, if it had finally upheld the award, would have gone one step further than any positional-risk case on record. So far, the doctrine has been applied only when the source of harm has been what the writer has classified as "neutral," in the sense that the harmful force is particularly associated neither with employment conditions nor with the claimant's personal life.[36] The positional-risk theory can be defended in these cases on the reasoning that, although the employment connection is very weak indeed, the connection with claimant's personal life is absolutely non-existent. Since the loss must

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[34]214 Miss. 569, 55 So.2d 381 (1951), *suggestion of error sustained*, 59 So.2d 294 (Miss. 1952) (5 to 4 decision).

[35]97 A.2d 593 (N.J. 1953).

[36]1 LARSON, WORKMAN'S COMPENSATION LAW §§ 7.30, 10.00-10.33 (1952).

fall on one or the other, there is more reason to make it fall on the employment, since there is at least the argument that the employment contributed by bringing the employee to the place where he was injured.

For this reason, the writer has attempted to substitute the "neutral-risk" terminology for that of "positional-risk." Until the *Brookhaven* case appeared, there was not on the books any such dramatic illustration of the practical difference between the "positional-risk" theory and the "neutral-risk" theory. It is submitted that the court ultimately drew this distinction, although not utilizing the "neutral-risk" terminology which had not at that time been published. It is to be hoped that the final disposition of the *Brookhaven* case will not be taken as discrediting the positional-risk doctrine when applied to neutral risks in Mississippi, for when so confined to such harms as lightning, stray bullets, and unexplained assaults, it represents the best theory yet devised on the proper interpretation of the phrase "arising out of the employment."

Conclusion

The above cases are a representative sample of the high standard of interpretation achieved by the Supreme Court of Mississippi. If space permitted, one could continue this analytical process as applied to remaining cases decided in widely assorted parts of the Act, but it is sufficient to say that the same standard of thoroughness and understanding permeates all the decisions. Although there are many important areas of controversy which have not yet arisen for judicial decision, the foundations of compensation law in Mississippi, statutory, judicial and administrative, have been admirably and competently laid.

State Bar Section

THE FEDERAL FALSE CLAIMS STATUTE

*Aubert C. Dunn**

With United States defense contracts continually being let, there would seem to be no better time for the lawyers to acquaint themselves with the most potent civil weapon of the Government in reaching those who practice fraud and deception in the execution of these contracts. This civil judicial weapon is better known as the Federal False Claims Statute.[1] Needless to say, there are thousands of these cases presently pending as a direct result of the defense program. It should be kept in mind, however, that the statute is equally applicable to any and all transactions wherein deceit has been practiced upon the Government to its damage.[2]

These cases are arising in almost every state,[3] not only from the execution of defense contracts, but from the operation of the cotton loan program of the Department of Agriculture, the administration of the Surplus Property Act, the Veterans Act, the Contract Settlement Act, Federal Housing, and innumerable other statutes. Surely, any federal statute which provides double damages and an unlimited number of large forfeitures should command the attention of the practicing attorney.

Substantially, the statute provides that all persons, except those in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States, are subject to its terms.[4] Corporations, being "persons," are subject to suit under the statute. As far as individuals are concerned, the statute applies only to civilians. The determination of whether a particular individual is subject to suit depends on his status at the time the alleged acts of fraud were committed; if he was a civilian at that time, it does not matter if he thereafter becomes a member of the armed forces. The reason for this limitation to civilians is that other legislation[5] provides for the imposition by military tribunals of other and different penalties upon per-

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[1]Rev. Stat. §§ 3490, 3493, 5438 (1875), 31 U.S.C.A. §§ 231-235. The original enactment was 12 Stat. 696 (1863).

[2]Such suits may be brought by any person, in the name of the United States, and the person bringing the suit may receive up to one-fourth of the amount recovered. Rev. Stat. § 3491 (1875), as amended, 31 U.S.C.A. § 232.

[3]The suit must be filed in the United States District Court for the district in which the acts charged are alleged to have been committed. Rev. Stat. § 3991 (1875), as amended, 31 U.S.C.A. § 232.

[4]Rev. Stat. §§ 3490, 5438 (1875), as amended, 31 U.S.C.A. § 231.

[5]62 Stat. 641 (1948), 2 U.S.C.A. § 237.

sons of the armed forces of the United States who commit any of the acts described.

The liability of those subject to the provisions of the statute is not defeated by death, bankruptcy, merger, consolidation, or the concurrence of any other similar event, and recovery may be had against trustees, receivers, executors, administrators, guardians, and, in general, against every type of successor to or legal representative of the original violator.

Acts Resulting in Liability

The Federal False Claims Statute sets forth six types of conduct which, if committed or engaged in by civilians or corporations, subjects them to suit on behalf of the United States.[6] Only three of these provisions are important to this discussion; these three apply to those persons:

> (1) Who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent;
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> (2) Who, for the purpose of obtaining or aiding to obtain the payment or approval of any claim upon or against the Government of the United States, or any department or officer thereof, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry;
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> (3) Who enters into any agreement, combination, or conspiracy, to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.

While, as previously mentioned, the first three categories are presently important to this discussion, this is not to say that the other three will always occupy a secondary position. In fact, there is growing evidence of the fact that increasing importance will attach to the last three categories of the False Claim Statute, *i. e.*:

> (1) Those having charge, custody or control of money or other federal property used or to be used in the military or naval service, or

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[6]See note 4 *supra*.

(2) Being authorized to make or deliver certain papers certifying the receipt of arms, ammunition, or other property of the government, delivers the same to others with the intent to defraud, or

(3) Knowingly purchases or receives in pledge for any obligation or indebtedness from a soldier, sailor or other person called into or employed in the military or naval service, any arms, ammunition, or other property of the Government.

The Claim

The presence of a claim is an element common and essential to all of the first three categories of the False Claims Statute, and a claim must be involved in the transaction alleged to be a violation of the statute. The first category relates to the making or presenting of a claim; the second category concerns the making or using of any certain enumerated documents in aiding to obtain payment or approval of a claim; and the third category refers to a conspiracy to defraud the United States through payment of a false or fraudulent claim. The ultimate scope of the judicial determination of what is and what is not a claim under the statute cannot now be predicted, but there can be no question that any request or demand, whether for or involving money, property, or anything of value which is requested or demanded to be given, delivered, loaned, leased, advanced, or made available, constitutes a claim within its meaning. The provisions operate, in terms, only with relation to claims upon or against the Federal Government, including all of its various branches, departments, or agencies.

Claims Presented to Intermediate Agencies

Liability under the first clause of the statute cannot be avoided merely because the original fraudulent claim is presented to and paid by a board of aldermen, county supervisor, or any state or local agency or body, if the United States is bearing a part of the cost of the project through federal grant or otherwise, or makes a contribution based on the claims which were presented.[7] Other similar instances concerning the indirect or ultimate responsibility of the United States for claims originally presented to other than federal agencies or officers may therefore be easily adduced. The guiding principle, however, is that already set forth: If the Federal Government bears temporarily or permanently any part of the cost, or makes any contribution as a result thereof, or is ultimately responsible, in whole or part, for the satisfaction of the claim

[7]United States *ex rel.* Marcus v. Hess, 317 U.S. 537, *rehearing denied,* 318 U.S. 799 (1943). This case is presently the gospel of the substantive and constitutional law questions raised by the False Claims Statute and should be carefully studied, together with the decisions cited therein. See United States v. Gardner, 73 F. Supp. 644 (N.D. Ala. 1947).

submitted, it is a claim caused to be presented against the United States within the meaning of the statute.

The second provision requires that the enumerated documents used to aid in obtaining the payment of a claim against the United States contain a fraudulent or fictitious statement or entry, but there is no requirement that the claim itself be fraudulent; liability may therefore be imposed under this subdivision upon one who submits a proper and accurate claim to the United States, but who forges, improvises, or fabricates any of the bills, vouchers, or other papers which are filed in support of the claim or to aid in obtaining its payment or approval. Where the claim is fraudulent, it will generally be accompanied by a false certificate or other document. It is elemental, of course, to all of the categories that there be knowledge of the false claim on the part of those against whom suits are filed.

Claims Presented by Subcontractors to Prime Contractors

The language which brings within the ambit of the statute those who cause false claims to be made or presented, finds its major application among subcontractors who manufacture or fabricate material for or supply merchandise or service to persons or companies holding prime contracts with the United States. If the claim which the subcontractor presents to the prime contractor is false and this false claim is included in the claim prepared by the prime contractor, or the defectively or improperly manufactured article of the subcontractor is included in the finished product covered by the claim of the prime contractor, then the prime contractor's claim has become false and fraudulent and the subcontractor, by his fraud, has caused it to be so.[8] Under the terms of the first provision the subcontractor would be subject to suit as one who had caused a false or fraudulent claim to be made or presented upon or against the United States. So, too, would be workmen, employed by subcontractors or prime contractors, operating on a cost-plus basis, who falsified time cards or piece-work reports so as to receive a larger wage than they actually earned.

The third provision, which relates to conspiracies to defraud the United States, differs from the first two provisions in that there is no requirement that the claim, whose payment or allowance the conspiracy seeks to achieve, be upon or against the United States. Subcontractors who conspire to defraud the United States by fraudulently inflating claims against contractors working under cost-plus Government contracts or persons who conspire to cheat the United States by submitting false claims to local governmental bodies in connection with projects financed in part by federal funds, are examples of those who are subject

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[8]United States v. Rohleder, 157 F. 2d 126 (3rd Cir. 1946).

to suit under the conspiracy provision. Generally, the necessary and requisite elements of conspiracy should always be present.

Statutory Sanctions

The False Claims Statute provides that any person "who shall do or commit any of the acts" provided therein, "shall forfeit and pay to the United States the sum of $2,000.00 and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act, together with the costs of suit."[9] The sanctions, therefore, provided by the statute are two-fold: $2,000.00 for each commission of an act covered by the statute, plus double the amount of damage actually sustained by the United States by virtue of each such act. This clearly means that such forfeiture may be imposed for every such act which is a separate and distinct violation of the statute, and this is true whether the acts complained of were repeated violations of the same clause or violations of different clauses of the statute. In fact, it is well settled that the same transactions may give rise to distinct violations constituting separate and distinct offenses.[10] In other words, for each false claim presented, or caused to be presented, and for each false bill, voucher, certificate or like paper containing a fraudulent or fictitious statement or entry, which is made or used or caused to be made or used, in support of a claim, and for each conspiracy or agreement entered into, having as its objective the payment or allowance of a false or fraudulent claim, the persons responsible are, aside from the actual damage caused by such action, liable to pay $2,000.00 to the United States. Where many false claims are presented or many false documents employed, the liability imposed becomes, of course, progressively heavier, increasing with the extent and seriousness of the fraud perpetrated. The actual damage provision requires no elucidation since it calls simply for the doubling of provable damages sustained by the United States.

Nature of Action

It will be interesting to note that despite the forfeiture language employed in connection with the $2,000.00 liability imposed for each act covered, actions brought thereunder are neither penal nor criminal in nature. The Supreme Court of the United States has determined that actions brought under authority of the statute are civil in nature and that their purpose is not to punish the defendant, but to reimburse and compensate the United States, insofar as possible, for the loss it has sus-

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[9]See note 4 *supra*.

[10]Blockburger v. United States, 284 U.S. 299 (1932); Albrecht v. United States, 273 U.S. 1, 11 (1927); Ebeling v. Morgan, 237 U.S. 625 (1915); Morgan v. Devine, 237 U.S. 632 (1915); Gavieres v. United States, 220 U.S. 338 (1911); Burton v. United States, 202 U.S. 344, 377 (1906); Rosser v. United States, 75 F.2d 498 (4th Cir. 1935); Berry v. United States, 18 F.2d 276 (8th Cir. 1927).

tained.[11] From this determination that such actions are civil in nature, several significant considerations follow:

(1) Where the action under the statute is preceded by a criminal action, as is usually the case, the civil nature of the second action prevents the defendant from raising the constitutional defense of double jeopardy.[12]

(2) Where there has been a prior criminal action which has resulted in an acquittal, the defendant cannot properly defend on the ground of res judicata since the degree of proof required by the Government differs in the two actions. In the criminal case the United States must prove guilt beyond a reasonable doubt; in the civil remedial action the United States need prove the essential elements of its cause only by a preponderance of the evidence.[13]

(3) The doctrine of respondeat superior applies.[14]

Conclusion

The False Claims Statute is unquestionably the most effective means which the Government possesses for recovering losses occasioned by fraud. And while this is its primary function, the heavy liability it imposes makes it as well a strong deterrent to those who could cheat or defraud the United States.

This discussion, of necessity, has been brief. There are many legal questions yet to be resolved in the trial of cases under the False Claims Statute, but it can be reasonably inferred that many of them will not be long in coming to the front in view of the larger number of cases now in the judicial mill.

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[11]United States *ex rel.* Marcus v. Hess, 317 U.S. 537, *rehearing denied,* 318 U.S. 799 (1943).

[12]United States *ex rel.* Marcus v. Hess, *supra* note 11; Commissioner v. Mitchell, 303 U.S. 391 (1938); United States v. Grannis, 172 F. 2d 507 (4th Cir.) *cert. denied,* 337 U.S. 918 (1949).

[13]Commissioner v. Mitchell, *supra* note 12.

[14]United States v. Armour & Co., 168 F. 2d 342 (3rd Cir. 1948); United States v. Fish, Inc., 154 F.2d 798 (2nd Cir.), *cert. denied,* 328 U.S. 869 (1946); Egan v. United States, 137 F. 2d 369, 379 (8th Cir.), *cert. denied,* 320 U.S. 788 (1943).

JOINT BANK ACCOUNTS IN MISSISSIPPI

*Warren V. Ludlam, Jr.**

Joint bank accounts are accounts the proceeds of which are payable to either or the survivor of the depositors. Such accounts are usually set up by the signing of a joint signature card provided by a bank. They are often used by a husband and wife but are not confined to this relationship. The proceeds of a joint bank account pass directly to the survivor on the death of one of the parties. Often a purpose in creating a joint deposit is to create such a survivorship and to eliminate the necessity for formal probate proceedings.

Joint ownership is a way of holding property which is not peculiar to bank accounts. However, this discussion will be confined to checking and savings accounts, time deposit certificates and safe deposit boxes.

There are a number of questions that can arise during the lives of the depositors or upon the death of one of them. One of the commonly asked questions is that of who can draw on the account during the lives of both parties. On the death of one of the depositors the question arises first of whether or not a joint bank account has been created, and secondly if such an account has in fact been created, what is the result? Do the will statutes apply? Does the account become part of the estate of the decedent? Is it subject to his debts? If the estate is of sufficient size, the question of federal estate and gift taxes and Mississippi estate taxes also arises. In connection with this last question we have the further problem of who must pay this tax. These and many other questions can arise in connection with joint bank accounts. No attempt is made in this article to answer all of these questions as this is primarily an article on Mississippi law, which at present does not provide all of the answers.

The Mississippi statute[1] on joint bank accounts provides as follows:

> "When a deposit has been made or shall hereafter be made in the name of two persons, payable to either, or payable to either or the survivor, such deposit or any part thereof or interest or dividends thereon, may be paid to either of the said persons whether the other be living or not, and the receipt of acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made. Any bank may

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[1]Miss. Code § 5205 (1942).

pay to the nearest relative of a deceased depositor, without necessity of administration, any sum to the credit of the decedent not exceeding five hundred dollars. The death of the drawer of a check upon a deposit in a bank shall not operate as a revocation of the authority of a bank to pay a check bearing the authorized signature of a depositor until after thirty days after the death of such depositor or thereafter until the bank has notice of death from a duly and legally appointed and qualified executor or administrator. This Act shall apply to all banking institutions, including national banks and postal saving banks within the state."

There have been a number of cases in Mississippi involving joint bank accounts.[2] In the early case of *Godwin v. Godwin*[3] the decedent

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[2]The account card used by one of the leading banks in Mississippi where depositors desire to create a joint checking account follows the form below:

Name ..... Address ..... No. .....
(of depositor or depositors)

(Name of Bank)
is hereby authorized to recognize the signatures executed below in payment of funds on deposit, or in the transaction of other business with the undersigned. All conditions printed on both sides of this card have been read and are hereby agreed to.

Authorized
Signature ..... Address .....

.....

.....

Date ..... Business ..... Telephone .....

Introduced by ..... Checking ..... Saving ..... Time C/D .....

In placing with you items for deposit or collection from time to time (the word items as herein used includes checks, notes, warrants, drafts, bills of lading, etc., and embraces all such items taken for either deposit or collection), it is agreed that this bank acts only as depositor's collecting agent when receiving items, and does not assume responsibility beyond the exercise of due care. Such items are accepted subject to final payment in cash or its equivalent. The right is reserved to send such items direct or indirect to any bank, including the payor bank, and to accept drafts or checks of such banks (but only subject to final payment) as conditional payment in lieu of cash, this bank reserving the right to charge back any item at any time before final payment, whether returned or not, and also any item drawn on this bank not good at close of business on day deposited.

This bank is authorized to select a correspondent or correspondent banks to assist in collecting such items, and this bank shall not be liable for default or negligence of any correspondent so selected, nor for loss in transit. Each correspondent so selected shall only be liable for its own negligence. In collecting such items this bank is authorized to handle them in the customary way adopted by banks for collecting similar items, and may use as many correspondent banks in such collection as is necessary in accordance with said custom of banks. All banks participating in the handling of such items shall have the same rights with reference thereto as are hereby given this bank. This bank, and all banks participating in the handling of such items, shall have the right to bunch and handle such items with other items, and may present such items to the bank on which drawn, separately or with other items on same bank, and may surrender such items in exchange for the draft or check of the payor bank, which draft or check may be for an amount including other items than those received by this bank from depositor. This bank shall not be liable for the amounts of such items

changed his bank account to the name of "W. F. Godwin and Wife," but his wife never exercised any act of control over the fund during the life of the decedent. After the death of W. F. Godwin, his widow drew out the account. His administrator brought suit against the widow and the bank. The chancellor held that both the bank and the widow were discharged. The Mississippi Supreme Court held that the bank was not liable under Section 3613 of Hemingway's Code, which is essentially the same as Section 5205 of the Mississippi Code of 1942, *supra*. The court reasoned, however that the purpose of the statute was to discharge banks of liability and not to amend or change the laws of descent and distribution, and the widow was held liable although the bank was discharged. No matter how clear the intention of Mr. Godwin was, there must be a delivery to constitute a valid gift. Since Mr. Godwin did not surrender control of the account, there was no delivery.[4]

In *Stephens v. Stephens*[5] Mr. and Mrs. Stephens signed a joint signature card stating that if one should die they wanted the remainder of

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received until it has completed final returns thereon, either in cash or its equivalent, or by final credit for such items in the correspondent bank to which this bank sends items for collection and credit. The surrender of such items by this bank or any correspondent bank assisting in the collection of such items, so as to render themselves unable to return such items to depositor, shall not render this bank or any correspondent bank liable for the amount thereof, even though such items may be surrendered to drawers thereof and their liability thereon discharged, the only liability on this bank or any correspondent being that it shall execute to depositor an assignment covering depositor's interest in any dishonored check or draft given by the payor bank or any correspondent bank for such items, and other items. It is understood that but for agreement to these conditions this bank would not receive such items either for deposit or collection, and this bank shall not be held liable because of receiving these items, for credit or collection, except and until cash returns have been received by it for such items, or except and until final credit has been given this bank for those items by the correspondent to which they are sent by this bank for collection and credit.

It is agreed no order for "Stop Payment" of any check drawn on this bank by depositor shall be valid unless the notice be in writing. Depositor agrees to all "Service Charges" now in effect, or hereafter installed by this bank.

This agreement supersedes and nullifies all other agreements between the depositor and this bank that are in conflict with this agreement, including therein deposit ticket, pass book and signature card agreements.

Joint Account — Payable to Either or Survivor

The undersigned agree and declare that all funds now, or hereafter, deposited in this account are, and shall be, our joint property and owned by us as joint tenants with the right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account or any part thereof may be withdrawn by, or upon the order of, either of us or the survivor. It is especially ageed that withdrawals of funds by the survivor shall be binding upon our heirs, next of kin, legatees, assigns, and personal representatives.

Signature Signature

[3]141 Miss. 633, 107 So. 13 (1926).

[4]Since the *Godwin* case was decided in 1926 the view of the court has changed, and this case was expressly overruled by In re *Lewis' Estate* which is discussed later in the text.

[5]193 Miss. 98, 8 So.2d 462 (1942).

their deposits to go to the survivor. Although the bank continued to carry the account under the name of W. S. Stephens until the time of his death, the joint signature card read in part as follows:

> "We agree and declare that all funds now, or hereafter, deposited in this account are, and shall be, our joint property and owned by us as joint tenants with right of suvivorship."

W. S. Stephens died testate and both his executors and widow demanded the fund. The bank filed a bill of interpleader resulting in a decree in favor of the widow; on appeal the Mississippi Supreme Court made the following statement:

> " . . . The rule deductible from what seems to us to be the weight of authorities is that when there is a clear intention to create a right which embraces the essential elements of joint ownership and survivorship in respect to a particular bank deposit or account, the intention, when lawfully evidenced, will be given effect and the survivor held entitled to the fund. . . . "

The court found that a joint account was created, and if gift be an element in the situation, there was an effectual consummation of the gift by way of the delivery of the written instrument to the bank as the agent of both donor and donee. On this point the court distinguished the *Godwin* case, *supra.*

In the case of In re *Lewis' Estate*[6] the original deposit had been made by "Mr. or Mrs. W. C. Lewis," but the amount had been subsequently increased. A son-in-law of the widow testified that the decedent's intention was to have the account so that if he died his widow could draw it out. The witness testified that both the decedent and his wife signed cards; he also testified that either could draw on the account. The lower court rendered a decree determining that the bank deposit belonged to the decedent's estate rather than to the widow. The only question on appeal was whether or not the evidence offered by the widow established, prima facie, a joint account with right of survivorship. The Mississippi Supreme Court, expressly overruling the *Godwin* case, *supra,* held that the evidence was sufficient to establish the prima facie intention of the deceased to create a joint interest and ownership of his widow in the deposit. The *Godwin* case did not discuss the theory of joint tenancy. The court differentiated between a gift of tangible personal property and a gift of an interest in a credit on the books of a bank. A written agreement is not essential to the validity of a joint tenancy. In discussing joint accounts, the court made the following statement:

> " . . . Even though it be considered that the statute[7] is intended

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[6]194 Miss. 480, 13 So.2d 20 (1943).
[7]Miss. Code § 3809 (1930).

> only for the protection of the banks, nevertheless it has the effect of recognizing or sanctioning the practice of accounts being carried in such manner, and such authority so conferred upon the banks is evidently founded on the presumption that the parties intended that the fund should be paid to the survivor."

While the statute does not change the laws of descent and distribution, it does raise a presumption of ownership. Joint ownership of a deposit is created when this is clearly the intention of the owner. The intention to make a present gift of a joint interest in such a deposit may appear in the statements of a depositor to the bank or may be shown by attendant circumstances. A change of a bank deposit from a single to joint names may operate as a completed gift in joint ownership if such a result was clearly intended. It is immaterial in determining the existence of a joint deposit whether the fund originally belonged to the depositor exclusively or to him and the other jointly.

In the case of *Leverette v. Ainsworth*[8] F. M. Leverette made a deposit to the credit of his mother but the deposit slip bore the following notation: "This A/C subject to check by F. M. Leverette at any time," and the signature card read as follows: "Authorized signatures, F. M. Leverette, subject to check by F. M. Leverette at anytime." The case arose on petition of the administratrix to have the deposit declared part of Leverette's estate. The finding of the trial court that the property was part of the estate was affirmed on appeal. The Mississippi Supreme Court stated that the decedent retained such control as to make the transaction ineffective as a gift in severalty, although the court did say that precise form is not essential if and when formal deficiencies are supplied by definite proof. The court indicated that had a clear intention to create a joint account with right of survivorship been shown, it would have given effect to the intention.

Shearin v. Coleman[9] involved a contest over the balance of a checking account and three certificates of time deposit. The checking account was in the name of "Mr. or Mrs. J. H. Barrow." Each of the time certificates was drawn in favor of "Mr. or Mrs. J. H. Barrow," and was "payable to the order of the survivor." Mr. Barrow predeceased Mrs. Barrow. The court found a presumption under the Mississippi statute[10] that both deposits created a joint ownership with the right of survivorship. Although the bequests of Mr. Barrow's will could not be satisfied without funds from the account, it was held to be the property of Mrs. Barrow. The test is not that applicable to gifts.

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[8]199 Miss. 652, 23 So.2d 798 (1945).
[9]201 Miss. 193, 28 So.2d 841 (1947).
[10]Miss. Code § 5205 (1942).

Duling v. Duling's Estate[11] involved a controversy over the contents of a safe deposit box, the box having been leased by Miss Duling and her two brothers from the bank. The sister and her brothers executed a joint tenancy agreement providing for right of survivorship of any money placed in the box. The agreement further provided that all or any part of the contents could be removed by any one or more of the lessees. On the death of one or more, the title was to be in the survivors jointly. One of the brothers drew out the money after the death of Miss Duling and handed it over to one Mrs. Hutchins when she insisted that it was a gift to her. The executor of Miss Duling's estate filed a petition against the brothers and Mrs. Hutchins. The court found that there was no gift by Miss Duling during her lifetime to Mrs. Hutchins since the element of delivery was lacking. The court held that the money belonged to the two brothers, after stating the general rule to be that, where a joint tenancy is created by a clear and unambiguous agreement and evidence of a contrary intention is not present, the courts find a true joint tenancy with respect to the contents of a safe deposit box.

The case of *Stewart v. Barksdale*[12] involved a contest over the ownership of funds in a building and loan association. The decedent had deposited funds in the association in the name of "Mr. O. L. Stewart or Shirley Ann Stewart." The agreement provided that:

> "We further agree and declare that all funds now, or hereafter, paid into this share account, or full paid certificate, are and shall be, our joint property and owned by us as joint tenants, with full right of survivorship . . . . "

The court found that it was not necessary to decide whether Section 5205 of the Mississippi Code of 1942 applies to building and loan associations as the funds had not been paid out. The court stated that the statute in no way limits the right to create a joint tenancy with right of survivorship in personal property, nor does a joint tenancy agreement change the laws of descent and distribution. There it was held that a joint tenancy with right of survivorship was created in clear and unambiguous terms and was sufficient to vest title in the survivor.

The most recent case in Mississippi on joint bank accounts, In re *Ware's Estate*,[13] came to the Mississippi Supreme Court on an appeal by the heirs of J. J. Ware, Sr., from a decree overruling objections to a final account. Ware died September 7, 1950, testate. At the date of his death there was a deposit in a bank in a savings account in the name of "J. J. Ware, Sr., or Mrs. J. J. Ware." This account was opened with both present. The signature card and pass book were introduced in evidence.

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[11]211 Miss. 465, 52 So.2d 39 (1951).
[12]216 Miss. 760, 63 So.2d 108 (1953).
[13]67 So.2d 704 (Miss. 1953).

There was also a savings and checking account in another bank. The signature card of one of the accounts showed the account as "J. J. Ware, Sr. and Rosena M. Ware," but it provided that the balance should be paid to "either or the survivor of said persons." The court held that the evidence clearly supported the chancellor in his holding that these accounts were joint accounts with the right of survivorship and that the estate had no interest in them.

From the wording of Section 5205 of the Mississippi Code of 1942, it would seem that the statute was intended to serve merely for the protection of banks where the money in the joint account was paid out. However, the Mississippi Supreme Court, in In re *Lewis' Estate* and *Shearin v. Coleman, supra,* as well as in other cases, appears to have broadened the statute into a property statute at least to the point of raising a presumption of ownership.

Both the Mississippi estate tax[14] and the federal estate tax[15] include in the decedent's gross estate for estate tax purposes the full amount of a joint account at the death of a decedent except such part as never belonged to the decedent. The question of original ownership also enters into the gift tax. There is no Mississippi gift tax, but a gift through a joint bank account may be subjected, under proper circumstances, to federal gift taxes.[16] Because of the non-existence of a Mississippi tax on gifts and because of the lower rates of the federal gift tax in comparison to the higher rates of the federal estate tax, it is desirable, as to estates of sufficient size and joint bank accounts of considerable amount, where one of the joint depositors is about to die, for the other depositor to draw out the account before the former's death. Then a federal gift tax would probably be due rather than both Mississippi and federal estate taxes.

As a general rule both Mississippi and federal estate taxes are payable out of the residuary estate, unless the decedent evidences a contrary intention, but under the federal estate tax laws, the personal representative of the decedent has a duty, unless otherwise directed by the decedent, to exact a proportionate contribution from beneficiaries of a decedent's life insurance.[17] This rule as to reimbursement is statutory and does not apply to joint bank accounts.

At the time a joint bank account is set up there is no gift subject to tax although one party contributes all of the money, as there is no completed gift at this time. However, when one joint depositor withdraws money from a joint account, there is a gift to the extent that his

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[14]Miss. Code § 9266 (c) (1942).
[15]Int. Rev. Code § 811 (e) (1).
[16]Int. Rev. Code § 1000.
[17]Int. Rev. Code § 826 (c).

withdrawals are of money placed in the account by the other depositor. As a practical matter, however, this gift tax, under such circumstances, does not usually arise because of $3,000.00 annual exclusion[18] under the gift tax applies as well as the $30,000.00 lifetime exemption.[19] The marital deduction of one-half also applies when the joint depositors are husband and wife;[20] so for most taxpayers this gift tax is more academic than real.

There is no income tax question on joint checking accounts, but this question does arise on savings accounts and time deposit certificates.

Joint bank accounts, like life insurance and joint tenancies of real property, pass outside of a testator's will. Neither the executor nor the administrator of the decedent's estate acquires any rights in a joint account. Such an account does not become part of the estate of the decedent and is not subject to the rights of the decedent's creditors.

In conclusion the following are several situations which might possibly arise under the joint signature card set out in footnote two, together with an opinion as to the effect of each situation:

(1) *A* opens an account in his own name. *A*'s is the only authorized signature and *A* does not fill out the joint account section of the account card. In this instance it is clear that a joint bank account is not established and that *A* is the only one who can draw on the account.

(2) *A* and *B* open an account in both of their names. Both of their signatures are authorized and the joint account card is filled out. Whether the accounts reads "*A* and *B*" or "*A* or *B*," if it provides that the balance is payable to "either or the survivor of said persons" under the authority of the *Ware* case, *supra,* a joint account is created. In such a case if the word "or" is used, clearly either party could draw on the account during their lives. If "and" is used, depending on the wording of the signature section of the card, it might be necessary for both to sign checks.

(3) *A* opens an account in his name only. His is the only authorized signature but the joint account section is filled out. Under the authority of the *Stephens* case, *supra,* it would seem that a joint account could be established in this instance. However, in the *Stephens* case there was outside evidence showing an intention to establish joint account and there was testimony to the effect that the signature of the wife was authorized.

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[18]INT. REV. CODE § 1003 (b) (3).
[19]INT. REV. CODE § 1004 (a) (1).
[20]INT. REV. CODE § 1004 (a) (3) (A).

(4) *A* opens an account in his name, authorizing the signatures of *A* or *B*, and does not fill out the joint account section of the card. Here either *A* or *B* could draw on the account while they were both living. The mere fact that two persons can draw on an account does not establish a joint account, but in the absence of evidence to the contrary would indicate that there were two signatures for convenience only.

(5) *A* opens an account in his name. Both *A*'s and *B*'s signatures are authorized and both fill out the joint account section. A joint account has probably been created.

(6) An account is opened in the names of "*A* or *B*." The signatures of both are authorized but the joint account section is not filled out. In re *Lewis' Estate, supra,* states that a written agreement is not essential to a joint tenancy. The intention to create such an account may be shown by external evidence; however, such evidence should be presented.

(7) Account is opened in names of "*A* or *B*." Only *B*'s signature is authorized but the joint account section is filled out. Probably in this instance the court would find an intention to create a joint account on the death of *B*.

(8) Finally, there is the situation where an account is opened in the names of "*A* or *B*," but only *A*'s signature is authorized and the joint account section is not filled out. The outcome of this case would probably depend on the evidence presented, outside of the joint signature card, as to *A*'s intention to create a joint account, with full survivorship rights, with *B*. It is believed that the mere opening of an account in the name of two persons, without more, is not sufficient under the present decisions of the Mississippi Supreme Court for the creation of a joint bank account with full rights of survivorship.

THE PROPOSED SALE OF SIXTEENTH SECTION LANDS IN MISSISSIPPI

*W. E. Morse**

When the State of Georgia and the United States set aside the sixteenth section lands of the State of Mississippi for the public schools, they thereby set aside and created a trust of these lands for the school children of Mississippi and for all of the school children yet unborn. One section of land, comprising 640 acres, was set aside in every township of thirty-six sections. The State of Mississippi is the trustee of the lands and, as such, is charged with the duty of seeing that this trust is preserved and protected for the use and benefit of the school children. These lands belong to the children of the public schools and cannot be sold.

There is a vast difference between granting a trust and giving power in or affecting property. A power is discretionary but duties created under a trust are imperative. Power is further distinguished from a trust in that in a trust, the trustee takes legal title subject to the limitations of the trust instrument. The trustee is a person holding the legal title to property under an expressed trust to apply the property and the income arising from it to the use and benefit of another. The beneficiaries in this case are the school children of the State of Mississippi and the countless hundreds of thousands of school children yet unborn. The trust created by the State of Georgia did not authorize the trustee to sell the sixteenth section lands. Neither an act of the legislature nor a constitutional amendment would authorize a diversion of this sacred trust to a use other than that of maintaining the public schools. In the case of *Nelson v. Ratliff*[1] the court held that where land is conveyed in trust it cannot be revoked by the grantor or by the trustee. This decision was followed in the case of *Anderson v. Love*[2] in which the court stated:

> "Where power to modify a trust is not expressly reserved, and creation of trust is not affected by fraud, duress or mistake, settlor is without power to modify the trust even though it was given without consideration."

Under the common law all land belonged to the Crown. Part of Mississippi was under the Spanish law. France claimed part of the land and England claimed a part. Pursuant to certain treaties Spain and France relinquished their claims to England. The English Crown gave to the colony of Georgia the lands from the Atlantic Ocean to the Mis-

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*Morse and Morse, Jackson, Mississippi.
[1]72 Miss. 656, 18 So. 487 (1895).
[2]169 Miss. 219, 153 So. 369 (1934).

sissippi River. After the United States came into being the thirteen original colonies agreed to cede to the United States the lands that they owned outside of their borders. This was done with the idea that the lands would be sold, new states would be formed, and the United States would become a great nation.

By the terms of the Ordinance of 1785 Congress provided for the disposition by sale of public lands in the Western Territory. This ordinance stipulated that every sixteenth section of land in every township of the public lands should be set aside and used for the maintenance of public schools. This land was not to be sold. The territory embraced by this ordinance included lands claimed by New York, Pennsylvania, and Connecticut. In 1787 Congress supplemented the original ordinance and further provided for the encouragement of education.

In 1802 Georgia ceded to the United States the land which is now the States of Alabama and Mississippi. The agreement between Georgia and the United States was signed on April 7, 1798, and established the limits of the State of Georgia and the Mississippi Territory. It stipulated that the territory thus ceded should form a state when it contained 60,000 free inhabitants, or at an earlier time if Congress thought otherwise, but it was ceded on the same conditions, restrictions, and provisions and in the same manner as provided by the Ordinance of 1787 for the Western Territory, with the exception that slavery was not prohibited. Thus, by the terms of this agreement all sixteenth section land in every township in the territory ceded was set aside in trust for schools. In 1802 the right of Georgia to her reserved lands in the Mississippi Territory was recognized and confirmed. Title to the sixteenth section lands was therefore determined through the compact between Georgia and the United States.

The sixteenth sections were not owned by the United States. They were reserved, and were never granted, but were created into a trust. The trust already existed and all subsequent acts of the United States recognize the trust created by this compact. *The status of our school lands were fixed by this compact* and neither Congress, the State legislature, nor the State of Georgia can change it.

By the Act of Congress, 3rd March, 1803,[3] provision was made for a survey and sale of the public lands in this territory; however all sixteenth section lands were reserved in each township for the *support* of schools within the same. In 1815 Congress provided that the County Courts in the Mississippi Territory should each appoint five commissioners to *lease* the school lands and apply the proceeds of each section

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[3] 1 STAT. 549 (1803).

to educational purposes within the township. It was provided that all such leases would terminate when the territory became a state. One of the first acts passed by the Mississippi Legislature after Mississippi became a state in 1817 was an act authorizing the Justices of the County Court, or a majority of them, to make leases of the land. The funds so obtained were to be used for education and for school buildings.

In 1833 provision was made for obtaining the consent of the inhabitants of a township as a condition of a lease. The state legislature and the courts treated the state as trustee during all this time. In *Connell v. Howard*[4] the question was whether the trustees had the power to lease the sixteenth section land or whether the title was in the United States. The court at that time said that the right had been too long acquiesced in to be questioned.

The Act of Congress, 19th May, 1852,[5] attempted to give the legislature the power that is now sought by some of the present holders of sixteenth section lands. The people have valuable improvements on these lands, and naturally they want to protect their investment. A statewide organization has apparently been set up to induce the legislature to sell these trust lands under the guise of providing for the present school emergency. The power to sell under the trust was never given and it is doubtful that any act of the legislature or even a constitutional amendment could destroy this trust.

In 1859, the court, in the case of *Hester v. Crisler*[6] accepted the view that the right and title to the sixteenth sections, reserved from sale in the Mississippi Territory by the Act of Congress, 3rd March, 1803, was not vested by that act or any subsequent act of Congress prior to the Act of Congress, 19th May, 1852, either in the state or the inhabitants of the township, but remained in the United States. The latter act was subsequently amended by the Act of Congress, 3rd March, 1857,[7] which ratified all previous sales of these lands, made by the authority of the state, and authorized the state to *sell* all such reserved lands. This rule appears to have been followed by the court on the erroneous assumption that until the Act of Congress, 19th May, 1852, the Government of the United States retained the legal title to the lands in controversy, as well as all other sixteenth sections reserved from sale by the Act of Congress, 3rd March, 1803. There was the further assumption that the reservation of sale by this act did not create a trust since this was before the creation of a state and townships and there was no one to take the trust and no beneficiary to enjoy it.

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4 5 How. 665 (Miss. 1841).
5 10 Stat. 6 (1852).
6 36 Miss. 681 (1859).
7 11 Stat. 200 (1857).

The *Hester* case was overruled in 1895 by the case of *Jones v. Madison County,*[8] in which the court stated:

> "The right of the inhabitants of the townships to have the lands for school purposes arises, not from the act of Congress, but from the act of cession by the State of Georgia of 1802. That state, and not the United States, is the donor. The United States never had the shadow of a right to these lands, save as trustee for the inhabitants of the prospective states which the act itself stipulated should be created. . . . We are therefore of opinion that the grant of sixteenth sections is in perpetuity to the inhabitants of the respective townships in which the land is situated. . . ."

Prior to the Act of Congress, 19th May, 1852, the sixteenth sections were leased, except in the lieu land cases. After the decision in the *Hester* case, the court was of the opinion that these lands were held by the United States, since they had been reserved from sale by the United States Government. The saving thing for the school lands was that in most instances it was necessary to get the approval of the township; in fact, leases of ninety-nine years required the approval of the township. Let us proceed to an examination of the lease phases for a period. The length of these leases is extremely important. In 1815 the lease could not extend beyond the time when the territory became a state. In 1824 the lease was limited to four years and the trustees were charged with the duty of protecting the timber.

The Bank of Mississippi was established in 1809, and remained in operation until 1834. In 1827, the legislature required the Governor to subscribe for 120 shares of stock of the Bank of Mississippi out of "Literary Funds." In 1828 $30,000 was subscribed from this fund. In 1830 the Planters Bank of Mississippi was established and the state subscribed for ten thousand shares. Bonds were issued with the full faith and credit of the state pledged for the payment of the principal and interest. The state-owned stock in the Bank of Mississippi was ordered sold and invested in the Planters Bank. The School Funds in the Bank of Mississippi were transferred to the Planters Bank on December 8, 1831.

On February 27, 1833, the trustees were authorized to lease sixteenth section lands for ninety-nine years. The leases were to be made to the highest bidders and they could be sold on credit for one, two, three and four year installments. The trustees were authorized to purchase stock in the Planters Bank and to use the dividends of the bank for educational purposes only. If the lease money received was less

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[8] 72 Miss. 777, 18 So. 87 (1895).

than one hundred dollars, the trustees were to let it out at ten per cent until they had another one hundred dollars and then invest it in the stock of the Planters Bank.

The stock held by the state in the Planters Bank was invested in stock of the Mississippi Railroad Company in February of 1839. In 1842 a legislative enactment secured to the State of Mississippi the assets of the Mississippi Railroad Company, for the redemption of the bonds of the state, issued for stock in the Planters Bank. In 1844 both the Planters Bank and the Mississippi Railroad Company were placed in liquidation.

In an article written by the Honorable W. R. Newman the following opinion was expressed:

> "In 1836 the Legislature, seeing that many of the people in the Township would not consent to the leasing of the land for 99 years when the proceeds were to be invested in bank stock, passed an Act still authorizing the leasing for 99 years, but providing that the proceeds of the lease could be invested in bank stock or loaned to individuals at interest. This opened up the gate to additional leasing of the land, and the money loaned out to individuals. The lending of the money to individuals was in a large number of instances made to friends of the persons holding the office, and was never collected. . . . In 1846 the Legislature created a Commission to handle the schools and the school lands, and directed that all of the school lands which were unleased should be leased for a period of 99 years and the principal invested and loaned out, and the interest thereon only spent for the common schools. . . . So it was that shortly after 1846 all of the land that had not been leased or sold at that time was leased for 99 years, and all the money received therefrom was to be held as an endowment for the public schools of the Township in which the land was located, and the interest thereon only spent. It, of course, took this Commission a few years in order to lease all of this land that remained unleased. The money from the proceeds of this leasing had been invested in bank stock or loaned to individuals. The money invested in the bank stock was all largely lost, and the money loaned to individuals was in a number of instances lost because the collection of the loans was never pressed."[9]

The original purpose of maintenance of education was forgotten. The trust imposed on the public officials was lost sight of and where the

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[9]Newman, *Shall We Again Dissipate Our Inheritance?* THE EDUCATION ADVANCE (Jan. 1947).

school lands were leased for ninety-nine years the holder of that lease treated the property as though he owned it in fee simple. The state continued to authorize leases for ninety-nine years, but generally it was provided that the consent of the township must be secured before such a lease was granted. From and after 1846, the money derived from sixteenth section leases or sales was supposed to be used on schools and only the interest money used for schools could be loaned out to individuals. Practically none of the principal or interest was ever collected.

In 1870 the Carpetbag Legislature authorized a *sale* or lease of sixteenth section land.[10] The power to sell was repealed in 1878. If the land really is trust property set aside for schools by the State of Georgia, then it is exceedingly doubtful that the legislature would have had authority to allow a sale or to convey a good title free of the trust; however, sales made in conformity with this legislation were upheld in *Foster v. Jefferson County*[11] and *Lambert v. State*.[12] The court treated the fact that the land was public land as being more significant than the fact that they were set aside and dedicated to a particular trust.

The Constitutional Convention of 1890 undertook to solve a great number of problems, one of which was the problem of preserving and protecting the school lands. Judge Edward Mayes, being deeply interested in education and being a most profound lawyer, sought to clarify the situation in regard to these lands. With that purpose in mind he introduced Section 211 of the Mississippi Constitution.[13] The Attorney General was then directed to prepare a bill for the next legislature to secure proper legislation to recover the squandered sixteenth section lands. The matter was referred to the Committee on Education, and a motion to refer the whole matter to the Committee on Judiciary was tabled. The latter motion was introduced by Mr. Richards, delegate at large from Lowndes County, who was particularly interested in the problem, since the city of Columbus was, and is, located on sixteenth section land, the leases to which were to expire shortly.

When the ninety-nine year leases made from 1833 began to run out, there was an act of the legislature to authorize exchange of property where the property proposed to be exchanged had an equal value with the sixteenth section land. In *Bridgforth v. Middleton*[14] the court stated:

> "The Constitution prohibits the state from parting with the possession and control of sixteenth section except for a definite and comparatively short period of time."

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[10]Miss. Code §§ 2015-2021 (1871).
[11]202 Miss. 629, 32 So.2d 126 (1947).
[12]211 Miss. 129, 51 So.2d 201 (1951).
[13]Miss. Const. Art. VIII, § 211.
[14]186 Miss. 185, 186 So. 837 (1939).

In 1942 a Constitutional Amendment authorized sixteenth section lands to be leased for a lump sum for ninety-nine years.

The courts have repeatedly saved these lands for the school children. In *Warren County v. Gans*,[15] the court held that growing timber could not be cut and sold by the leasee thereof, but that it belonged to the schools. In *Moss Point Lumber Company v. Supervisors*[16] the court held that only a leasehold right was given under a ninety-nine year lease. In *State v. Dear*[17] a purchaser paid the Supervisors five hundred dollars for timber on which he held the lease. When he sold the timber for four thousand dollars, the court held that a fair and adequate price had not been paid and authorized the Attorney General to collect the difference in the price. In *Humble Oil & Refining Company v. State*[18] the court held that the County Board of Supervisors, as trustees for the benefit of educable children of the township in which lieu lands are located, were required to exercise a higher degree of care than in the management of either their official or personal business. In *Pace v. State*[19] the court held that the state, as trustee for the inhabitants of the township and for the support of the schools therein, acquired title to sixteenth section lands at the time of the creation of the state. It was further held that the state cannot abdicate its duty as trustee of property in which the whole people are interested, any more than the state can surrender its police power in the administration of government and in the preservation of peace and order.

Our court has held that the State of Mississippi was a trustee with respect to sixteenth section lands. That being true, a trustee accepting a trust cannot contest the title of the creator of the trust and cannot claim or assert any claim contrary to the beneficiary of the trust. It would be estopped to question the title of the estate of the persons for whose benefit the trust was created and for whom he holds it. The rule is that except where a trustee has been deceived, when a trustee accepts a trust and undertakes to perform all of the duties devolved upon him, the trustee is estopped from denying the validity of the trust.

What does all of this mean with reference to the sale of the sixteenth section lands? The State of Georgia created the trust in connection with the United States. The lands were reserved and were not authorized to be sold. The only time that this trust can be dissolved is when there has been a completion of the trust because all of the children born and unborn have been educated. No good title can be given free from this

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[15]80 Miss. 76, 31 So. 539 (1902).
[16]89 Miss. 448, 42 So. 290 (1901).
[17]212 Miss. 620, 55 So.2d 370 (1951).
[18]206 Miss. 847, 41 So.2d 26 (1949).
[19]191 Miss. 780, 4 So.2d 270 (1941).

trust. The consent of the State of Georgia should be obtained before a good title would pass.

The proponents of the "sell the land idea" say that we will preserve the trust. We will convert the sixteenth section lands into money and we will use that money or the interest thereon for schools. We will thereby get away from having to look after the sixteenth section lands, from having the Board of Supervisors lease it for a song, from having the timber stolen, and from having the farmer fail to make his crop. This is a question of economics and of good management.

We are confronted at the threshold of this line of argument by Mississippi cases in which the rule is laid down. In the case of *Mayes v. Mayes*[20] the court held:

> "That equity will not authorize a sale of trust property for reinvestment of its proceeds although the value of the trust estate will be thereby increased, unless necessary to accomplish the purpose of the trust or to prevent the loss or destruction of the trust estate."

This rule of law dealing with trust property is explicit and definite; but even if the rule were different and the purpose of the trust could be changed, it is the opinion of the writer that it would not be wise to do so.

Since the recent discovery of oil and gas in Northeast Mississippi, the state has become more mineral minded. There is potential production of both oil and gas all over the state. The legislature has thrown proper safeguards around the leasing of school lands. In most cases the oil companies pay as much or more for a lease on school lands than they pay private land owners. Some school lands are in production and others will be producing soon. Is this time to stop and sell all of the chances of the schools for future revenue from these lands? Is it proper to take this revenue from the educable children and turn it over to a few speculators?

Since the old ninety-nine year leases have run out, the County Superintendents and the Supervisors have been more conscious of their responsibilities to the school children. The County Superintendent of Hinds County approached the problem realistically and rented farm lands out at so many bales of cotton, just as any other farm land might be leased. This increased the rent from four to ten times what the rent would have been on a straight money rent. This method of rental was

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[20]133 Miss. 213, 97 So. 548 (1923); *accord, In re* Hart's Estate, 206 Miss. 498, 40 So.2d 263 (1949).

upheld in *Terry v. Mayo*.[21] If this method were used over the state, the schools would be immeasurably better off.

In the opinion of the writer, the sale of the sixteenth section lands will not solve all of the school problems; in fact, it will create new and different emergencies. It is very doubtful that a good title to these lands could be given. The school would suffer under such a program. Furthermore would it be safe to convert the land into cash? Is the cash as safe as the land? The state lost the cash that it received from these lands before.

The authorization of the leasing of all of the lands for ninety-nine years for a gross sum proved to be a failure as a scheme to deal with this problem before. Such leases were practically tantamount to a sale. The present school trustees, teachers, pupils, and even the legislature would not be here to worry with this problem in ninety-nine years, but the children will be here. The weight of the one hundred thousand petitioners asking that the sixteenth section lands be sold under a constitutional amendment should not be sufficient to wreck the school land system which was set up by the State of Georgia for the benefit of the school children of Mississippi.

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[21]211 Miss. 462, 52 So.2d 13 (1951).

DISCOVERY OF LIABILITY INSURANCE POLICIES IN PERSONAL INJURY SUITS TO WHICH THE INSURER IS NOT A PARTY

*J. M. Morse, III**

In view of the fact that Mississippi now requires all persons operating automobiles over its highways to have security for damages caused to others by reason of negligence, and in view of the fact that the personal injury field is probably the largest single field of litigation in this state, this writer has attempted to learn the methods used in other states to obtain policy limits and conditions and to determine whether or not the same methods could be used in Mississippi practice. The findings are set out herein and it is hoped that the similarity between the California procedure and the Mississippi procedure is sufficient to allow the use of these methods here.

The primary purpose of this article is to point out the similarity between certain well known, though little used, portions of the Mississippi statutes regarding interrogatories and perpetuation of testimony, and similar provisions in the state of California, where the same are generally used to discover liability insurance policy limits and to force production of the insurance policy for inspection and copying by party litigants. Another purpose ancillary thereto is to discuss the use of insurance policies as evidence in personal injury suits where the question of master and servant is at issue.

California Statutes

Testimony is perpetuated in the state of California under sections 2083-2089, Code of Civil Procedure. Sections 2083 and 2084, containing the substance of the matter, provide as follows:

> "Section 2083 (Evidence may be perpetuated) The testimony of a witness may be taken and perpetuated as provided in this chapter.
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> "Section 2084 (Manner of application for order) The applicant must produce to a judge of the superior court a petition, verified by the oath of the applicant, stating:
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> "1. That the applicant expects to be a party to an action in a court in this state, and, in such case the names of the persons whom he expects will be adverse parties or;
>
> "2. That the proof of some fact is necessary to perfect the title

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to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

"3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved.

"The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this state, must be personally served, and if unknown, such notice must be served on the clerk of the county where the property to be affected by such evidence is situated, or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the clerk of the county to whom the deposition must be returned when taken."

Section 2085 specifically provides for notice of time and place of the taking of the depositions; section 2086 provides for the manner of the taking, including the issuance of a commission if in a foreign state, written interrogatories or oral interrogatories, and the filing of the deposition with the appropriate court; section 2087 provides that the filing of the documents with the court constitutes prima facie compliance with the orders of the judge. Section 2088 provides when the evidence may be taken, and the intra positions of objections thereto; section 2089 provides that the deposition so taken has the same effect as oral evidence of a witness given at the trial.

Mississippi Statutes

The statutory provisions relating to the perpetuation of testimony in the state of Mississippi are generally sections 1714 through 1724, and by reference sections 1699 through 1709 and section 1712, MISS. CODE (1942). Sections 1714 through 1717 contain most of the substance of the statutes regarding perpetuation. Section 1718 concerns perpetuation of the testimony of a minor; section 1719 provides for the perpetuation of the testimony of a resident witness; section 1720 provides for the issuance of depositions. Section 1721 provides for the issuance of a commission; section 1722 provides for the recording of the deposition; section 1723 provides for the use of the depositions; section 1724 provides that the party perpetuating the testimony shall pay all costs.

Since section 1716 provides for the perpetuation of the testimony of the non-resident witness by interrogatories filed and since section 1720

contains all of the provisions for summoning witnesses, by reference section 1712 becomes material. This statute provides that the testimony of a non-resident party to a suit may be obtained by filing interrogatories in the clerk's office and sending a copy thereof, together with a notice of the filing, to such non-resident party.

By comparison we see that there is no material difference between the California statutes authorizing perpetuation of testimony and the corresponding Mississippi statutes. In view of this the decisions of the California courts will, in all probability, be followed in Mississippi since they violate no rule of public policy.

California Decisions

The first case dealing with suits to perpetuate testimony, and the discovery of insurance policy limits thereby, is *Demare v. Superior Court.*[1] The petitioners instituted an action in the Superior Court against Appling and Dawley to recover damages for personal injuries. They also filed a separate action, under the perpetuation statutes, seeking an order for an examination of Appling, alleging therein that Dawley carried a policy of insurance, effective at the time of the accident, with the Pacific Indemnity Company. It was further alleged that, as soon as petitioners recovered judgment against Appling and Dawley in the pending personal injury suit, they intended to bring suit on the policy of insurance against the Pacific Indemnity Company and intended to join Appling and Dawley as proper party defendants to the action.

Subsequently, Appling appeared before a notary and was there examined. Although directed by the notary so to do, he failed to produce the policy of insurance as directed in a subpoena duces tecum, and during the ensuing examination refused to answer material questions regarding the insurance policy and its provisions. However, Appling admitted the existence of the policy and also admitted that it had been in his possession two days before the examination.

The lower court, on final hearing, refused to enforce the original order for examination and the perpetuation of testimony on the ground that the order was inadvertent, and made by mistake, and refused to issue another subpoena duces tecum. The petitioner Demaree then applied for a writ of mandate to compel the court to act on the previous order.

The Supreme Court of California allowed a peremptory writ of mandate compelling compliance with the first order and production of the policy, setting forth their reasons therefor as follows:

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[1] 10 Cal. 2d 99, 73 P. 2d 605 (1937).

"From the allegations of the petition it appears that the petitioners have met the requirements of sections 2083-2086 of the Code of Civil Procedure. It definitely appears, from the allegations of the verified petition for the order for examination produced to the judge of the court, that the petitioners expect to be parties to an action, and give the names of the persons who, it is expected, will be adverse parties. It also definitely appears that the proof of facts is desired and necessary to establish matters, which it may hereafter become material to establish. The name of the witness to be examined and a general outline of the facts expected to be proved also appear. The application, considered also as an application for a subpoena duces tecum, sufficiently specifies 'the exact matters or things desired to be produced,' and sets forth in sufficient detail the materiality thereof to the issues involved in the case, and sufficiently shows that the witness Appling had the insurance policy in his possession or under his control. . . . We think it must be conceded that the provisions of the policy of insurance are germane to petitioners' cause and material to their anticipated action, when and if brought. We are of the view, therefore, that the applicants laid a sufficient basis for the issuance of the order providing for perpetuation of testimony and the production of the insurance policy. . . . Respondent's principal contention seems to be that to permit the examination and to require the production of the insurance policy in question would result in unreasonable search and seizure, in violation of the provisions of the Constitution. The authorities cited in support of this contention fail, in our judgment, to meet the case. They relate, for instance, to a subpoena to produce 'all books,' without specific description of particular and material documents. . . . "

The *Demaree* case was followed in the case of *Superior Insurance Co. v. Superior Court*[2] wherein the petitioner insurance company sought in the Supreme Court of California a writ of mandamus to compel the Superior Court to vacate an order for the perpetuation of testimony, and to quash a subpoena duces tecum issued in connection therewith. Hayes, the real party in interest, filed in the Superior Court an application for the perpetuation of testimony under sections 2083 to 2089 of the California Code of Civil Procedure in which she alleged that she expected to be a party to an action against Whitten and the Superior Insurance Company to enforce payment of a judgment which she expected to be rendered in her favor against Whitten in another action pending in that court against Whitten for personal injuries arising out of the negligent operation of an automobile. She alleged also that the facts

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[2]37 Cal. 2d 749, 235 P. 2d 833 (1951).

expected to be proved were the existence of an automobile casualty insurance contract insuring Whitten against liability for personal injury and property damage and the provisions of insurance policies including the effective dates and the amounts of insurance. The Superior Court granted the application, and ordered the taking of depositions of Whitten and one Hoffman, the president of the Superior Insurance Company and their agent for service of process in California. The court also ordered the issuance of subpoenas duces tecum requiring Whitten to produce all liability policies insuring him on the date of the accident, together with premium receipts and notices, or correspondence pertaining to the effective periods of such policies.

At the deposition Hoffman testified that the Superior Insurance Company had issued a policy of liability insurance covering Whitten which was in effect on the date of the accident, and that investigation had revealed no policy defenses; but he also testified that he did not have the authority to bind the company by a statement that it would pay the limits of the policy and would not interpose any policy defenses, and that it would permanently and faithfully preserve and make available all policies at any time after an action was instituted. He produced specimen policies which he stated to be accurate and true and correct reproductions of the policy issued, with the exception of the amount of the policy limits of insurance and the premiums paid, but he refused to testify to the policy limits and except for specimen policies did not produce the documents required by the subpoena duces tecum, although he testified that he had such documents and offered to file them as a sealed instrument with the clerk of the Superior Court to be opened in the event suit was actually brought on the policies. Hoffman was thereupon ordered to show cause to the Superior Court why he did not answer the disputed question before the hearing. The proceeding for mandamus was brought by the insurer asking that the peremptory writ be granted quashing the subpoena duces tecum, and vacating in its entirety the order for the taking of the depositions, or in the alternative quashing the subpoena duces tecum and amending the order so as to limit the oral examination of the witness to testimony of whether the liability insurance was in effect on the date of the accident, whether there were any known policy defenses, whether the premiums had been paid, and whether said insurance company would satisfy a final judgment against Whitten.

The Supreme Court of California denied the peremptory writ sought, reinstating the order requiring the policy limits to be given, stating as grounds therefor the following reasons:

> "It is settled that mandamus is a proper remedy if upon the facts shown the challenged order should be vacated or the subpoena quashed. . . . Here, as in *Demaree v. Superior Court,* . . . it appears that the application to take the deposition meets the requirement

of sections 2083-2086 of the Code of Civil Procedure in that it is shown by such application that the applicant expects to be a party to an action; the names of the persons who it is expected will be adverse parties are given as well as the names of the witnesses to be examined; a general outline of the facts expected to be proved is stated; and it further appears that the proof of such facts is desired and necessary to establish matters which may hereafter become material to establish. In that case it was held that 'It must be conceded that the provisions of the policy of insurance are germane to . . . (the applicant's) cause and material to their anticipated action, when and if brought. We are of the view, therefore, that the applicants laid a sufficient basis for the issuance of the order providing for the perpetuation of testimony and the production of the insurance policy.' . . . Mandate was granted to compel the trial court to issue the subpoena and order the witness to testify with reference to the policy.

"Petitioners in the instant case seek to distinguish the *Demaree* holding, urging that there the material fact sought to be established was whether the liability insurance policy covered the defendant driver of the automobile involved in the accident as well as the owner thereof, whereas here it is the policy limits that are sought. The attempted distinction is not persuasive. From the opinion in *Demaree* it appears that the applicants there sought to establish by the testimony of the defendant automobile owner that 'he was in fact insured,' as well as to compel him to produce his policy. The witness appeared at the deposition but 'failed to produce the policy of insurance as directed in the subpoena duces tecum, and, during the ensuing examination and interrogation, refused to answer certain material questions then and there propounded to him regarding the insurance policy and its provisions. The questions are, with particularity, set forth in the report of the notary. However, . . . (the witness) admitted the existence of the policy and that it had been in his possession two days before the examination.' . . . The holding is that the policy itself must be produced and that the witness may not be permitted to confine his testimony to the fact that insurance exists.

"The *Demaree* case specifically rejects the contention that to require the production of the insurance policy 'would result in unreasonable search and seizure, in violation of the provisions of the Constitution.' . . . Petitioners here urge, however, that 'the sanctity of a private contract should not be subjected at this time . . . to inspection and review merely because someone alleges that some day he expects to sue another to enforce payment of a judgment expected to some day be obtained.' A sufficient answer to such contention

is found in the fact that an automobile liability policy evidences 'a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy,' *i. e.,* a contractual relation is 'created between the insurer and third parties.' . . . The provisions of such a policy are not, therefore, a matter for the sole knowledge of the named assured and the insurance carrier to the exclusion of the injured person; the very pendency of an action by the injured person brought in good faith against the named insured person gives the former a discoverable interest in the policy. . . .

"Petitioners' further argument that knowledge of the policy limits is sought in order to provide an undue and oppressive advantage in negotiations for settlement of the personal injury action also appears to be without merit. How knowledge by the plaintiff in that action of facts which are known to defendants therein, concerning the policy or policies in which plaintiff will have an enforceable interest if she recovers, could give her an 'undue and oppressive advantage' in negotiations for a settlement does not appear. And whether such knowledge by plaintiff would tend to benefit plaintiff or defendants might depend to a material extent upon the relationship between the seriousness of the injuries which resulted from the accident and the amount of insurance coverage provided by the policy; conceivably knowledge of low policy limits might constitute a benefit to defendants by tending to discourage a seriously injured plaintiff from holding out for a settlement commensurate with the extent of the injuries.

"We have been cited to no authority and are aware of none which would support petitioners' offer to file the documents 'as a sealed instrument' with the superior court clerk or which would permit them to avoid production of the policies on the promise to 'preserve these records and make them available after any final judgment is obtained in any personal injury action.' Such an offer, however, may be compared to the offer of any other witness seeking to escape questions on a deposition to confide his testimony under seal to the court, or his promise to reveal the facts on a subsequent date. No authority or substantial reason for innovating such a limitation in our statutory perpetuation proceeding as applied here has been suggested."

Conclusions

It will be seen from a comparison of the California and Mississippi statutes that in substance they are essentially the same, the only differ-

ence being procedural. Whereas the California Code of Civil Procedure provides for a direct action against an insurer after judgment is rendered against an insured, Mississippi allows an action by garnishment, which is in effect the same.[3] Most policies themselves provide, as does the California statute, for suit on the policy after judgment.[4]

By filing the written statement or petition or application provided for in MISS. CODE § 1714 (1942), and giving notice thereof to the insurance company as well as the nominal defendant, the petitioner is then in a position to proceed with the taking of the depositions. In section 1712 and the decisions thereunder, the petitioner has a valuable discovery aid, provided the party whose deposition is to be taken resides out of the state of Mississippi. In that event, simply by filing interrogatories in the clerk's office together with a copy thereof, and giving notice of the filing and the copy of the interrogatories to the opposite party, or his attorney or solicitor, answers of the other party may be compelled, or *the bill may be taken as confessed since the statute so provides.*[5]

A casual reading of sections 1712 and 1714 may well mislead the petitioner's attorney as to the notice required in order to effectively bring the opposing party before the court. In the case of *Merchant's Grocery Co. v. Merchant's Trust and Banking Co.*[6] the Mississippi Supreme Court held that, in view of the severe penalty provided by this section the statute should be strictly construed as to the service required. The interrogatories in that case were served on the defendant's attorney by the stenographer for the counsel of the complainant, and the certificate of service was duly attached to the copy of interrogatories which were filed with the court. The court held that MISS. CODE § 3941 (1906)[7] required that all notices provided by law appertaining to suits or proceedings of any kind in any court should be served and returned by an officer; therefore, service by an individual was not in compliance with the statute.

If one complies with the statute, in certain respects these interrogatories are broader in scope than those provided for by Rule 33 of the Federal Rules of Civil Procedure. In the case of *Illinois Central R. R. v. Sanford*,[8] the contention was made that this section, providing for the

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[3]Employers Liability Assurance Corp. v. Bodron, 65 F.2d 539 (5th Cir.), *cert. denied*, 290 U. S. 698 (1933); Commercial Casualty Insurance Company v. Skinner, 190 Miss. 533, 2 So. 2d 225 (1941).

[4]Fleming v. Travelers Insurance, 206 Miss. 284, 39 So. 2d 885 (1949); National Mutual Casualty Company v. Parke, 193 Miss. 27, 7 So. 2d 800 (1942); Travelers Indemnity Company v. Holiman, 174 Miss. 220, 164 So. 36 (1935); Downing v. Home Indemnity Company of New York, 169 Miss. 13, 152 So. 841 (1934); Adams v. Maryland Casualty Company, 162 Miss. 237, 139 So. 453 (1932).

[5]Palmetto Fire Insurance Co. v. Allen, 141 Miss. 681, 105 So. 483 (1925).

[6]119 Miss. 99, 80 So. 494 (1919).

[7]MISS. CODE § 1876 (1942).

[8]75 Miss. 862, 23 So. 355 (1898).

taking of testimony by interrogatories, applied only to such parties as could give testimony and therefore that a corporation could not testify or be a witness. The court held, however, that corporations conducted their business through officers, these officers are heads of departments that speak for the corporation regarding matters confided to their management, and therefore the corporation could be compelled to answer their interrogatories by their proper officers. From a practical standpoint, since almost all of the liability insurers are non-resident corporations, this section can well be used to obtain their testimony.

In California a subpoena duces tecum may issue without the necessity of an application and an order by the court. This is not the case in Mississippi, and in view of the crowded conditions of court calendars, such a method might well delay the plaintiff until it would be too late, were it not for the holding of the court in *Cumberland Telephone & Telegraph Co. v. Mississippi*.[9] In this case the court reaffirmed the case of *Illinois Central R. R. Co. v. Sanford, supra,* in applying the statute to corporations. The Attorney General filed interrogatories addressed to the telephone company requiring it to file answers to the interrogatories sworn to by its officers, or agents, with information in their possession, and further to attach to the interrogatories documents and letters requested by the interrogatories as exhibits to its answers. The court held that the petitioner had a right to force the production of the documents under the provisions of this section, *and that the same was used as a substitute for a subpoena duces tecum*. Thus, under these holdings, interrogatories could be propounded to a non-resident insurance company requesting them to file as exhibits to their answers, copies of the insurance policies, premium receipts, and correspondence relating thereto, regarding liability insurance, insuring the named defendant against loss, and compelling the insurance company to produce the same.[10]

While the general rule is to the effect that evidence directly or indirectly showing or tending to show that the defendant in a personal injury suit or a death action carries liability insurance is inadmissible as such, there are a few well recognized exceptions.[11] The Mississippi cases most directly in point deal with the admissibility of evidence of insurance where the existence of the relation of master and servant is at issue. Evidence of insurance is admitted to show control as relevant evidence to the issue of respondeat superior.[12] The Mississippi court, however, has

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[9]98 Miss. 159, 53 So. 489 (1910).

[10]Brackett v. Woodall Food Products, Inc., 12 F.R.D. 4 (1951); Orgel v. McCurdy, 8 F.R.D. 585 (1948). A similar case, although unreported, is *Peterson v. Price* (District Court of the Fourth Municipal District of Minnesota). A copy of the order and supporting memorandum opinion requiring the production of insurance policies will be found in 10 N.A.C.C.A. L. J. 304 (1952).

[11]20 Am. Jur., Evidence §§ 389-392.

[12]See Notes, 105 A.L.R. 1325 (1936); 75 A.L.R. 395 (1931); 74 A.L.R 855 (1931); 56 A.L.R. 33 (1928).

had this issue squarely before it on two different occasions, and on both has allowed the introduction of evidence to show insurance was carried by the defendant where the same related to the issue of master and servant.

In *Finkbine Lumber Co. v. Cunningham*,[13] a suit for personal injuries, the defendant claimed that the plaintiff was employed by an independent contractor. Evidence was introduced to show that the defendant charged the employees, including the alleged independent contractor, with accident insurance. Evidence also showed that the defendant collected certain amounts to be paid as premiums from the plaintiff and that this money was paid to the insurance company, and by them applied as premiums on accident insurance. Further, it was shown that the company required that this insurance be kept up on all employees working for the alleged independent contractor. The court, following the cases of *Brior v. Timreck*,[14] and *Laffery v. U. S. Gypsum Co.*,[15] held that evidence that the owner carried insurance indemnifying it against loss and damage from accidents to its laborers was competent as showing the real relationship between the person superintending the operation of the machinery and the owner.

The *Finkbine* case was followed in *Pan American Petroleum Corp. v. Pate*,[16] where the defendant, Pan American Petroleum, defended on the ground that the bulk distribution dealer was an independent contractor and hence that the plaintiff was not their servant. A liability insurance policy covering the truck injuring the plaintiff, and inuring to the benefit of Pan American, was admitted on offer of the plaintiff. The court held that under the doctrine announced in the *Finkbine* case this evidence was admissible, as tending to show the real relationship between the parties to be that of master and servant.

The Mississippi court in both of the above cases rejected the argument made by the defendant that the evidence of insurance, although relevant, was so prejudicial as to be inflamatory and to cause a biased verdict. The court held in the *Pan-American* case and the *Finkbine* case that evidence of insurance, where relevant to the issue of control, was properly admitted. Such an argument was also rejected by the New York court in *Rinklin v. Acker*.[17] The court said:

> "The notion that a juryman is so lawless or weak, or corrupt, that if he finds out that a defendant is insured against damage for accidents, he will render a verdict against it, when he would not

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[13]101 Miss. 292, 57 So. 916 (1911).
[14]66 Kan. 770, 71 Pac. 581 (1903).
[15]83 Kan. 349, 111 Pac. 498 (1910).
[16]157 Miss. 822, 126 So. 480 (1930).
[17]124 App. Div. 891, 108 N.Y.S. 125 (1908).

have done so, if the fact had been kept from him is so false and unjust to jurymen that it should not be dignified with discussion.

"It must be humiliating to jurymen to learn that such low estimate of their intelligence and integrity is entertained anywhere, much more among judges who review their verdict on appeal."

The foregoing discussion shows that in certain cases an insurance policy and correspondence and papers relating thereto may be relevant to the issues involved in a suit in this state. In such cases, MISS. CODE §§ 1658, 1659 (1942), may also be used to discover the policy. Section 1658 provides for the issuance of subpoenas duces tecum by the judges of circuit and county courts, and by the chancellors in vacation, in the same manner if allowed in open court. Section 1659 provides for the furnishing of copies of books, papers, or other documents containing evidence relating to the merits of the action.

The application for a subpoena duces tecum in a case where the insurance policy is relevant to the issues may be made in the actual case pending, instead of in a separate action as above discussed in the petitions to perpetuate testimony. By reference the same might also be used as a supplementary method in the petition to prepetuate testimony.

While in the case of *Brackett v. Woodall Food Products, supra,* the court required the defendant to produce the liability insurance policy for the plaintiff to examine on the broad viewpoint that it was relevant to subject matter of the litigation, it is doubtful if the Mississippi court would go so far, unless the case in litigation came within the doctrine announced in the *Finkbine* case. Where, however, a separate action is brought to perpetuate the testimony for use in an ancillary action by garnishment against the insurer after a judgment is had against the insured, such a policy, without question, would be relevant to the issues presented in such a case, and would be properly discovered.[18]

It is to be remembered, however, that the discovery procedure outlined under the perpetuation statutes is an action separate and distinct from the personal injury action brought in the circuit court. The suit to perpetuate testimony is a separate action brought in the chancery

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[18]Additional authority for the processes set out in the text for the discovery of policy limits and conditions are found in MISS. CODE § 8285-21 (1942), which provides that any insurer issuing a policy to satisfy the requirements of the Motor Vehicle Safety-Responsibility Act shall pay on behalf of the insured all sums which the insured shall become *legally obligated to pay as damages* (as contrasted to payment of any final judgment) arising out of the operation of such motor vehicle, and providing further that the liability of the insurance company *shall become absolute* whenever injury or damage covered by said motor vehicle policy occurs.

It would be possible to construe this latter provision in such a manner as to allow the joinder of the insurer as a party defendant. Employer's Ins. Co. v. Johnston, 238 Ala. 26, 189 So. 58 (1939); Fidelity & Deposit Co. v. Rainer, 220 Ala. 262, 125 So. 55 (1929).

court and as such has no connection with the suit for personal injuries brought in the circuit court. For this reason the issue of insurance would never be injected into the trial of the personal injury action itself.

SAMPLE FORM

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR
THE CITY AND COUNTY OF SAN FRANCISCO

IN THE MATTER OF THE APPLICATION)
OF NO. .....
MARY SMITH TO PERPETUATE TESTIMONY)

PETITION FOR ORDER OF EXAMINATION OF WITNESSES
AND FOR ISSUANCE OF SUBPOENA DUCES TECUM
TO PERPETUATE TESTIMONY.

Petitioner, Mary Smith, respectfully represents that:

I.

Petitioner expects to be a party to an action in the Superior Court of the City and County of San Francisco against the Red Insurance Company, 268 Tree Street, San Francisco, hereinafter called the "Insurance Company," and Peter Piper.

II.

Said action is expected by reason of the following facts:

There is now pending and undetermined an action in the Superior Court of the State of California, in and for the County of Alameda, entitled Mary Smith, et al., v. Peter Piper, No. 0000, to recover from said party damages for the death of A. LaRouge, resulting from said A. LaRouge being struck while crossing 10th and 20th Avenues in Alameda on May 2, 1947, by an automobile driven by Peter Piper. Petitioner is informed and believes and therefore alleges that Peter Piper carried a policy of automobile liability insurance effective at the time of said collision in his name or in the name of some other person or corporation in said Red Insurance Company. As soon as petitioner recovers judgment against Peter Piper, she intends to bring a suit on said policy or certificate of insurance against said insurance company.

III.

Peter Piper resides at 1630 Millsaps Street, Alameda, and John Doe is an officer of the said insurance company; that all of said witnesses will be necessary witnesses in said law suit against said insurance company; that they, and each of them, have knowledge, information and documents pertaining to said expected action, and petitioner desires to examine them at this time and take their depositions to perpetuate their

testimony. By these witnesses petitioner expects to prove the provisions, contents, limitations and clauses relating to the amount and limitations of said insurance, also the person or persons the policy of insurance actually covers.

IV.

The true name of the defendant sued herein as John Doe is unknown to the petitioner and for that reason he is sued herein by said fictitious name.

WHEREFORE, petitioner prays that an order be made herein authorizing the oral examination of Peter Piper and John Doe and the taking of their depositions and directing the production by said witnesses of said policy of insurance, certificates of insurance, records and all other attachments and/or indorsements covering the automobile involved in the aforementioned accident in which petitioner's husband met his death.

DATED:

Respectfully submitted,
Attorney for Petitioner

NOTES

THE ENIGMA OF PHILANTHROPY AND TAXATION

The amazing growth of charitable foundations between the years of 1915 and 1952[1] has provoked many inquiries into the provisions for charitable bequests in the Internal Revenue Code. This increase of philanthropic transfers is indicative of the attractiveness of the existing tax laws and suggests that magnanimity may cloak obscure motives. This note undertakes a survey of the perplexing problems of philanthropy prior to the Internal Revenue Code of 1950, and presents the results obtained by these revisions. All manners of estate planning are affected by the particular statutes governing charitable bequests. It is therefore pertinent to look first at the statutes involved.

Statutes

The statutes provide that philanthropic transfers are exempt from income tax,[2] estate tax,[3] gift tax,[4] corporation tax,[5] and that they may be deducted from the income of trusts and estates.[6] Although generally the tax provisions of the Internal Revenue Code are strictly construed, the courts have held that tax exemptions in favor of charity should be liberally construed.[7] This liberal construction has been applied to Section 812 (d) of the Internal Revenue Code, a provision which has its counterpart in all the tax statutes. A portion of this provision is as follows:

> "Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; . . . "

The specific problem for all donors has been the degree of compliance necessary to secure an exemption. It is apparent on the face of the statute that the words "Organized and operated exclusively" and "no part of the net earnings of which inures to the benefit of any private shareholder or individual," are those which have presented the most difficulty.

Organization and the Charitable Foundation

The charitable foundation is the most common device used by donors as a vehicle for their bequests. The descriptive words "fund," "endowment," "association," "institute" and many other similar terms

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[1]Fortune, August 1947, p. 109.
[2]Int. Rev. Code § 230.
[3]Int. Rev. Code § 812 (d).
[4]Int. Rev. Code § 1004 (a) (2) (b).
[5]Int. Rev. Code § 101 (6).
[6]Int. Rev. Code § 162 (a).
[7]United States v. Pleasants, 305 U.S. 357 (1939); Old Colony Trust Co. v. Commissioner, 301 U.S. 379 (1937); Helvering v. Bliss, 293 U.S. 144 (1934); Bohemian Gymnastic Assn. Sokol of City of N. Y. v. Higgins, 147 F. 2d 774 (2nd Cir. 1945).

are interchangeable[8] with "foundation," which has been defined as a non-profit, non-governmental, organization having a principal fund of its own and established to aid or maintain activities serving the common good.[9] The foundation exists without capital stock or provision for dividends, deriving its funds from public or private sources and carrying out a purpose recognized by law as charitable.[10]

The foundation may be created without complexity in any one of several ways.[11] It is usually formed by means of a trust,[12] or corporation,[13] with the latter being the more widely used method.[14] The words in the statute,[15] "Organized exclusively," must be considered first in relation to the purposes of the organization. These words unambiguously state the legislative intent of granting tax exemption to those organizations whose objectives are confined solely to philanthropy; however, tax exemption has been granted even in cases of organizations formed under a business charter where the owners would formally,[16] or informally,[17] amend the charter to comply with the requirements as to charitable purposes. This liberal approach adopted by the courts has been taken even further by allowing a nonexempt body to organize and control a charitable organization, and thus receive exemption, so long as the funds of the latter are not to be used or diverted to the former.[18] Thus, if the organization gives the appearance of a charitable purpose and compliance is made with the statutory requirements, under the lenient interpretation, it has not been difficult to produce a "charitable" institution.

Even though exemption was not legally allowed to a corporation where the exempt institution owned part of the stock of that corporation, it was a common practice, prior to 1950, for exempt charitable institutions to liquidate a corporation and operate it directly, in this manner receiving exemption for its assets and business income. This was the holding in *Roche's Beach, Inc. v. Commissioner*[19] which logically followed from the dicta expressed in 1924 when the United States Supreme Court held that the determining factor of an exempt organization was the ultimate disposition of the income, and not the source.[20] The aforementioned problem of unrelated business income with its implication of unfair competition with "taxable business" arose after the *Roche's Beach* case, and was taken up by the 1950 revisions.

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[8]Note, *The Use of Charitable Foundations for Avoidance of Taxes*, 34 VA. L. REV. 182 (1948).

[9]HARRISON AND ANDREWS, AMERICAN FOUNDATIONS FOR SOCIAL WELFARE 11 (1946).

[10]Scholarship Endowment Foundation v. Nicholas, 25 F. Supp. 511, 513 (D. Colo. 1938), *aff'd*, 106 F.2d 552 (10th Cir. 1939); *cert. denied*, 308 U.S. 623 (1940).

[11]Note, *The Modern Philanthropic Foundations: A Critique and a Proposal*, 59 YALE L.J. 480 (1950).

[12]3 SCOTT, TRUSTS §§ 348, 348.2, 348.3 (1939).

[13]BALLANTINE, CORPORATIONS § 7 (1946).

[14]Note, 34 VA. L. REV. 193, 195 (1948).

[15]See note 3 *supra*.

[16]Unity School of Christianity, 4 B.T.A. 61 (1926).

[17]Faulkner v. Commissioner, 112 F.2d 987 (1st Cir. 1940).

[18]*Ibid.*

[19]96 F. 2d 776 (2nd Cir. 1938).

[20]Trinidad v. Sagrada Orden, 263 U.S. 678 (1924).

Operation

The same broad interpretation used by the courts in regard to the "organization" of a charitable foundation was shown in dealing with the "operation" clause. The question of the meaning of "operated exclusively for charity" became almost paradoxical. While holding that a charitable organization must not be operated for private gain,[21] the courts allowed exemption where relatives received certain funds,[22] where recipients were servants,[23] and where compensation has been made to employees of the donor's corporation.[24] The word "exclusive" in the statute was theoretically replaced by the word "primarily."[25] The charitable organization was allowed to operate tax exempt even though it simultaneously provided small annuities to relatives of the donor,[26] or salaries to the donor's family;[27] and there was even a further exemption extended to an organization not in operation during the taxable year.[28]. In the *Bruckner* case,[29] at the time of the hearing, there was an accumulation of income for sixteen years, while in the *Mellon* case,[30] a deduction was sustained where paintings had been in the complete control of the testator during his lifetime, and the project for charity not begun until after his death. Reviewing the operation of the charitable foundation, one sees that prior to 1950, if the major portion of the bequest finally reached its charitable destination, the courts were not bothered with the totality. Exemption was, of course, denied where the proportion of disposition of income to others was greater than that marked for charity.[31]

Advantages to the Donor

The charitable foundation has been attractive to persons possessing a great amount of wealth, and who wish to do something with their money other than passively allow it to go to the Government upon their death. A primary advantage of such a foundation has been that it enables the donor to retain a control which may be delegated to whomever he wishes after his death. It also has given the donor an organization in which to place other properties from year to year, reducing his income, and letting him take advantage of appreciated holdings. Since the property is deductible at the fair market value rather than cost,[32] another important factor to be considered as an advantage has been the duration of the charitable organization. A charitable trust may be set

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[21]Debs Memorial Radio Fund v. Commissioner, 148 F.2d 948 (2nd Cir. 1945).

[22]Estate of Annie Sella, 10 T.C. 692 (1948).

[23]Havemeyer v. Commissioner, 98 F. 2d 706 (2nd Cir. 1938).

[24]Gimbel v. Commissioner, 54 F.2d 780 (3rd Cir. 1931).

[25]Commissioner v. Citizens and Southern National Bank, 147 F. 2d 977 (5th Cir. 1945); Anderson Country Club, 2 T.C. 1238 (1943).

[26]Lederer v. Stockton, 260 U.S. 3 (1922); Edward Orton, Jr. Ceramic Foundation, 9 T.C. 533 (1947), *aff'd.* 173 F.2d 483 (6th Cir. 1949).

[27]Home Oil Mill v. Willingham, 68 F. Supp. 525 (N.D. Ala. 1945). .

[28]Mellon v. Commissioner, 36 B.T.A. 977, 1064 (1937); Bruckner v. Commissioner, 20 B.T.A. 419 (1930), 5 CCH 1949 FED. TAX REP. § 9257 (N.D. Ala. 1949), 5 CCH 1950 Fed. Tax Rep. § 11,860 (1950).

[29]See note 28 *supra.*

[30]*Ibid.*

[31]Roger L. Putnam, 6 T.C. 702 (1946); Northern Illinois College of Optometry, P-H 1943 TC MEM. DEC. 43,396 (1943).

[32]SEYBOULD, AMERICAN FOUNDATIONS AND THEIR FIELDS 8 (5th ed. 1942).

up forever,[33] escaping the rule against perpetuities,[34] since society desires security for charitable beneficiaries.[35] The donor also had the right to prohibit the spending of any of the donated capital of the organization.[36] Tax immunity, embracing the donor and the foundation, has been one of the chief lures of charitable transfers. Through the years other advantages of the charitable provisions of the Internal Revenue Code have appeared, one of the most important of these being the reduction of current income without depletion of capital by setting up a charitable trust for five years, with the income to go to charity for the life of the trust, and the principal to revert upon its termination.[37] Charitable foundations created many problems because of the taxpayers' use of these advantages in ways not actually contemplated by the Internal Revenue Code.

Problems and Potential Tax Avoidance Devices

Operation of Businesses. A major problem confronting the Government was the debatable issue concerning the right of charities to operate businesses. The usual practice was for the charity to buy a business and, due to the tax exemption, pay more, giving the seller an unusually large profit. The business could then be operated directly, or through a new charitable corporation. Thus, a tax exempt person was allowed to operate a business, with the business being exempt from all taxes, and with the obvious consequence of being able to provide low price goods which would sell for less than those of its tax paying competitors. Regardless of this consequence, the business still remained tax exempt since the disposition of income and not the source was the test. Tax exemption was also granted to private "feeder" corporations whose stock was owned by charities and which operated bathing beaches,[38] oil wells and cotton gins,[39] and the now famous macaroni factories.[40] The charitable foundation also offered to a business firm the advantage of being able to carry on research on such problems as labor relations,[41] whereas if this research were conducted by the non-exempt business it would constitute capital expenditures.[42]

Lease-backs. The typical lease-back arrangement occurred where a charitable foundation borrowed funds from a third person and purchased the business or property, paying back the amount borrowed out of the income from rent received from a lessee.[43] With the rent being tax free, the charitable organization contributed in reality little more than its exemption. The exempt organization could also pay more for the property, and accept a rental lower than could ordinarily be accepted from a lessee. Then, too, a more favorable loan could be obtained by the purchaser since all the rental income could go to satisfy the indebtedness.

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[33] 3 Scott, *op. cit. supra* note 12, § 365.
[34] Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 639 (1938).
[35] In re Browning's Estate, 165 Misc. 819, 827, 1 N.Y.S.2d 825, 832 (1938).
[36] *Supra* note 8, at 182, 198.
[37] *Supra* note 1, at 140.
[38] See note 19 *supra*. *Contra*: United States v. Community Services, Inc., 189 F.2d 421 (4th Cir. 1951).
[39] Sands Spring Home, 6 B.T.A. 198 (1927).
[40] Mueller Co. v. Commissioner, 190 F.2d 120 (3rd Cir. 1951).
[41] 19 Sen. Doc. No. 415, 64th Cong., 1st Sess. 8383 (1916).
[42] Addressograph-Multigraph Corp., 4 T.C.M. 147 (1946).
[43] Cary, *Corporate Financing Through the Sale and Lease-Back of Property Business, Tax and Policy Considerations*, 62 Harv. L. Rev. 1 (1948).

The Textron story[44] is one of the chief examples of this problem. It clearly illustrates how a private corporation obtained the above benefits. Little, a trustee for a charity who was simultaneously a member of the Textron firm, devised a plan whereby Textron eventually obtained great benefits from the purchase of the charity of another corporation by way of the lease-back arrangement. If the charities could continue such a practice, one might say that unpredictable amounts of real estate could eventually become owned by tax exempt charities, and the Government would be faced with a damaging reduction in the tax base. The lease-back arangement was also adopted by Yale, Cornell, and the University of Pennsylvania to buy, theoretically, businesses such as Gimbel's and then lease them back to the sellers.[45]

Family Control. The most glaring example of family control over a charitable foundation was the Ford Dynasty. The Ford Foundation was, beyond a doubt, set up with a dual motive. With the realization that estate taxes would necessitate the liquidation of the Ford holdings, over ninety percent of the non-voting stock was granted to the Ford Foundation. In this manner, exemption from estate taxes was obtained and, at the same time, that part of the estate given to the Foundation remained under the control of the Ford family.[46] Assuming, of course, that the main motive of the donor is philanthropy, the charity, paradoxically, does not reap the proportion of benefits that the donor receives.[47] Though a personal use of the funds by the donor or his beneficiaries cannot be obtained, there are undisputable advantages, such as: the maintenance of high positions, high salaries, and the retention and building of economic power.[48]

Another common practice has been the provision for a life estate with the remainder to go to charity after the beneficiary's death, in order to reduce the taxes on the donor's estate.[49] Since the estate tax was computed only on the actuarial value of the life estate, the life estate was understandably enhanced. While the accumulation of funds and private economic power was, at this time, not prohibited, the main query was directed towards its desirability. One could ask: Is it desirable to favor Government exemption to private fortunes, thus giving them Government subsidy without a really proportionate benefit to the public? There was no compulsion on the Ford Foundation to release any part of its holdings annually.

The Important Provisions of the Revenue Act of 1950

The purpose of the Revenue Act of 1950 was to eliminate or lessen certain problems which had arisen under the Internal Revenue Code.

The Feeder. "Feeder" organizations (business organizations claiming exemptions solely because their income is payable to an exempt or-

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44Note, 59 Yale L.J. 477, 492 (1950).

45*Hearings before Committee on Ways and Means on Proposed Revisions of the Internal Revenue Code,* 80th Cong. 1st Sess. 3411 (1950).

46N. Y. Times, April 22, 1947, P.29, Col. 8.

47N.Y. Times, Aug. 17, 1949, p. 21, col. 1.

48*Supra* note 11, at 501.

49Int. Rev. Code § 812 (d).

ganization) are denied exemption.[50] The denial of exemption of "feeder" organizations overrules such cases as the *Roche's Beach* case, [51] *Mueller v. Commissioner,* [52] and *Trinidad v. Sagrada.*[53] Thus, tax exempt businesses in direct competition with taxable businesses are made to conform with the standards imposed upon the latter. The law, however, is not retroactive, and exemption is allowed to feeders[54] prior to the effective date of the revision, January 1, 1951.[55]

Unrelated Business Income. The 1950 Act pertained mainly to the three types of exempt organizations listed in paragraphs 1, 6, and 7 of Section 101. Organizations other than those exempt under Section 101 were not affected. The policy behind the Act of 1950 was to treat corporations and trusts under subsections 1, 6, and 7 of Section 101 of the Code the same as all other corporations and trusts, so far as their unrelated income was concerned.[56] The theory of the unrelated business tax is to reach that charitable organization actively engaged in business, and the crucial part of the statute reads:

> " . . . the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption under Section 101."[57]

The problem immediately arises, it must be noted, as to which activities are related, and which are not. There are some exceptions, such as a university restaurant,[58] or business carried on to sell gifts received by charitable organizations.[59] Other exclusions are passive income (*i. e.,* rents, dividends, interest, annuities and royalties) and capital gains, except those rents which may be inclusive by reason of a Supplement U Lease.[60]

Lease-back Income. The purpose of the Supplement U Lease Income provision [61] was for the taxation of that income which the charitable organization obtains from acting as an active participant in business by borrowing funds to purchase property, leasing the property to a lessee, and applying the rents to the indebtedness. However, if the acquisition of the property was made without borrowing money, the rents are not taxable; but if property is obtained by gift or devise with a mortgage up-

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[50]"An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under any paragraph of this section on the ground that all of its profits are payable to one or more organizations exempt under this section from taxation. For the purpose of this paragraph the term 'trade or business' shall not include the rental by an organization of its real property (including personal property leased with the real property)." Int. Rev. Code § 101.

[51]See note 19 *supra.*

[52]See note 40 *supra.*

[53]See note 20 *supra.*

[54]Int. Rev. Code § 601.

[55]Int. Rev. Code § 303.

[56]Dane, *Taxation of Charities under Revenue Act of 1950* in N.Y.U. Ninth Annual Institute on Federal Taxation 895, 899 (1950).

[57]Int. Rev. Code § 422 (B).

[58]Int. Rev. Code §§ 422 (B) (1), (2).

[59]Int. Rev. Code § 422 (B) (3).

[60]Int. Rev. Code §§ 422 (A) (1), (2), (3), (5).

[61]Int. Rev. Code §§ 422 (A) (4), 423 (B).

on it, there is a Supplement U Lease indebtedness.[62] The amount of rent included in the computation of the tax is the proportion of the total rents as the borrowed funds bear to its adjusted cost basis of the property.[63] Thus, it would seem that those charitable organizations using their exempt status for trading in a lease-back arrangement will be very hesitant to do so in the future. Looking at the lease-back provision carefully, it would seem that the well-endowed university is in a more favorable position than one which is not financially well off. There is room for criticism of this provision, for it does not seem adequate in reaching all of its objectives. To correct an abuse, Congress, it seems, has sacrificed the welfare of the smaller organizations.

Prohibited Transactions. In contemplation of those cases where donors, trustees, and officers had derived substantial benefits from their dealings with charitable organizations such as the sale of securities to, or the purchase of securities from, the organization, or the borrowing of funds from the organization, or the taking of excessive salaries by the donors, trustee, or officer, or rendering preferential services,[64] Congress denied exemption for these so-called prohibited transactions.[65] The denial of exemption does not, however, apply to such public organizations as religious groups, active educational institutions, or hospitals, all of these having the benefit of doubt as to becoming involved in such a transaction.[66] After a prohibited transaction, exemption is usually denied for all years subsequent to the receipt of a notice of violation from the Treasury Department. Exemption can be denied retroactively if the transaction was entered into with the idea of diverting a substantial part of the corpus or income from its exempt purposes.[67]

Unreasonable Accumulation of Income. In the instances where organizations received tax exemptions without distributing an adequate portion of their income for exempt purposes, Congress provided that organizations subject to "prohibited transactions" in Internal Revenue Code, Section 3813, would also be denied exemption for unreasonable accumulation of current or past income, and also if the income were invested in such a manner as to jeopardize the carrying out of the charitable purpose.[68] Private charitable organizations were required to also file information returns on their respective financial conditions.[69] The information collected was to be open to the public at the local collector's office.[70] It should also be noted that the loss of exemption was only for one year, and that unreasonable accumulations or prohibited transactions could be cured by a subsequent filing of an application if data was produced showing repentance and a good faith compliance with the law.[71]

Conclusion

The provisions of the Internal Revenue Act of 1950 which have been

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[62]Int. Rev. Code § 423 (B).
[63]*Supra* note 56, at 905.
[64]36 Senate Report 120 (1950).
[65]Int. Rev. Code § 3813 (C).
[66]Int. Rev. Code § 3813 (A).
[67]See note 65 *supra*.
[68]Int. Rev. Code §§ 3814, 162 (G) (4).
[69]Int. Rev. Code § 153.
[70]U.S. Treas. Reg. 111, § 39.153-3 (1951).
[71]Int. Rev. Code §§ 162 (G) (2) (D), 3813 (D).

discussed are, in one sense, a solution to some of the problems presented by philanthropy. However, with skillful planning, the capable tax lawyer could probably circumvent most of the restrictions due to the fact that some of the provisions are rather loosely worded.[72] Other provisions, at the opposite extreme, produce hardships[73] and need clarification. One of the most startling results of the revisions is that, in some instances even charities lose their exemption status, heretofore an unheard of proposition. The Act itself has been severely criticized as complicated,[74] and much comment has come forth from discussions on the subject.[75]

The majority of charitable transfers are made by the small proportion of men who are in the upper income bracket. This fact indicates that these men who are either extremely wealthy, or possess a valuable estate, gain "something" (not necessarily a monetary profit) by their charitable impulses. This "something" has taken many forms of "control," "lease-backs," and "business expansion." The "something" that the donor of more moderate means gains is probably tax benefit through careful estate planning. Usually income may be reduced[76] by a charitable transfer, thus reducing the donor's taxes and allowing him to receive credit for a charitable donation of which a large percentage would have ordinarily gone to the Government. The Government in this manner may be said to actually subsidize the charity.

To eliminate misunderstanding, it is imperative to realize that one cannot give to charity without depleting his estate to some extent. The donor may gain in prestige or other intangible profits, but his beneficiaries often lose part of the monetary estate without the compensating gain of prestige. While taxes may be reduced on the estate proper by charitable donations, that is only an end in view; and in estates with many children, they are the ultimate losers. In short, when one gives to charity, at least part of the money given depletes the estate and is not absorbed by the tax laws.

The revisions of the Internal Revenue Act of 1950 attempted to solve many of the tax problems discussed in the text and in the conclusion. If the provisions of this act are not adequate, it is safe to speculate that a remedy will arise in the near future. The rapid growth of the popularity of charitable donations in the past twenty-five years will be matched by the same rapid growth of the tax laws.

Alvin Binder

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[72]See notes 67, 68 *supra*.

[73]See note 63 *supra*.

[74]Eaton, *Charitable Foundations and Related Matters under the 1950 Revenue Act*, 37 VA. L. REV. 1, 283 (1951).

[75]Comment, 60 YALE L.J. 851 (1951); Note, *Taxation of Sale and Lease-Back Transactions*, 60 YALE L.J. 879 (1951).

[76]BOWE, TAX PLANNING FOR ESTATES, (1949).

RECENT DECISIONS

BILLS AND NOTES—DISCHARGE OF NEGOTIABLE INSTRUMENTS BY DESTRUCTION

An owner held bonds which had been in default as to both principal and interest for approximately six years. Upon obtaining the opinion of plaintiff, a financial agent, that the bonds were worthless, she destroyed them. Later the debtor company reorganized and bonds of this series were made redeemable. Plaintiff, assignee of the owner, made a demand for the value of the destroyed bonds, offering an indemnity bond against wrongful payment. Upon refusal this action was brought. HELD: Although there can be no discharge without an intent to nullify the obligation, the intentional destruction of the bonds is the highest evidence of an intent to forgive the obligation, which evidence can only be overcome by showing that the destruction was either an unintentional act or a mistake. There was no mistake or unintentional destruction within the meaning of the Oklahoma statute.[1] *State Street Trust Co. v. Muskogee Electric Traction Co.*, 204 F.2d 920 (10th Cir. 1953).

At common law the loss or destruction of a sealed instrument cancelled the obligation since a sealed instrument was not merely the evidence of the obligation, but the obligation itself.[2] Now, although the Negotiable Instruments Law provides that a negotiable instrument may be discharged by the intentional cancellation by the holder,[3] it also provides under another section that cancellations arising from mistake or an unintentional act or without the authority of the holder are inoperative.[4] Numerous cases state that there is no discharge where the destruction or cancellation of the instrument was an accident or oversight.[5] The court in the subject case follows the generally accepted rule by stating that there can be no cancellation by destruction without an intent to discharge the obligation.[6] Thus a note destroyed or mutilated in a fit of temper[7] or under the influence of fraud[8] is not cancelled.

The court here, basing its conclusion on section 123 of the Negotiable Instruments Law,[9] seems to have properly placed the burden of proof upon the party claiming that the destruction was inoperative.[10] Therefore, this presumption should also be rebuttable as provided by the Negotiable Instruments Law—by showing that there was a mistake, unintentional act, or lack of authority.[11]

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[1] 48 OKLA. S. A. § 265 (1951). The Negotiable Instruments Law was adopted by Oklahoma in 1909.

[2] 1 WILLISTON AND THOMPSON, WILLISTON ON CONTRACTS § 205 (2nd ed. 1936).

[3] "A negotiable instrument is discharged: . . . (3) By the intentional cancellation thereof by the holder." NEGOTIABLE INSTRUMENTS LAW § 119 (3).

[4] "A cancellation made unintentionally, or under a mistake or without authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority." NEGOTIABLE INSTRUMENTS LAW § 123.

[5] Drake Lumber Co. v. Semple, 100 Fla. 1757, 130 So. 577, *rehearing denied*, 100 Fla. 1771, 130 So. 577 (1930); Manufacturers' National Bank v. Thompson, 129 Mass. 438 (1880).

[6] *In re* Lock's Will, 187 Misc. 535, 64 N.Y.S. 2d 206 (1946); Henson v. Henson, 151 Tenn. 137, 268 S.W. 378 (1925).

[7] Schlemmer v. Schendorf, 20 Ind. App. 447, 49 N.E. 968 (1898); Greene v. Poz, 182 N.Y.S. 900 (N.Y. 1920).

[8] Thompson v. Fourth National Bank of Montgomery, 215 Ala. 476, 111 So. 29 (1926).

[9] See note 4 *supra*.

[10] Conner v. Martin, 46 Ind. App. 141, 92 N.E. 3 (1910); *In re* Philpott's Estate, 164 N.W. 167 (Iowa 1917); Norton v. Smith, 130 Me. 58, 153 Atl. 886 (1931); Alego v. Stewart, 223 Mo. App. 1003, 7 S.W. 470 (1928).

[11] See note 4 *supra*.

The unique point raised by the subject case is whether the destruction due to the mistaken belief that the bonds were worthless falls within the above exception. The court by presenting its definition of mistake[12] actually narrows the meaning of mistake so that it is almost synonymous with an unintentional act. Other definitions of mistake[13] seem to fit more closely into the spirit of the Negotiable Instruments Law. The broader definition is especially appealing when it is considered that the defendant owes the bondholder a definite obligation, no public harm may be done by allowing the claim, and the debtor corporation is unjustly enriched.

It is submitted that the court had difficulty in finding an intent to cancel the obligation. The court admits that there was no intent to make a gift, but somehow finds that by destroying bonds not thought to represent any obligation there was an intent to discharge. This conclusion seems to have been reached by interpreting an intentional destruction of the *instrument* as an intent to destroy the *obligation*. Certainly there was no intention to make a gift of the debt to the debtor or to release the debtor from a debt known to exist.

It is further submitted that the rule of this case would make any intentional act of destruction of the instrument a discharge thereof, without an intention to nullify the obligation, even though under its announced rule an intent to nullify the obligation is required. An intention to destroy the evidence of a debt is not an intention to destroy the debt.

William P. Dulaney

CONSTITUTIONAL LAW — RESTRICTIVE COVENANTS — AWARD OF DAMAGES BY STATE COURT FOR BREACH AS STATE ACTION PROHIBITED BY FOURTEENTH AMENDMENT

White petitioners sued white respondent at law in a California state court to recover damages for the breach of a restrictive covenant contained in the deed through which respondent gained title to the real property in question. The covenant provided that the real property described therein should never be used or occupied by any person not wholly of the white or Caucasian race. Respondent had conveyed said realty to, and allowed it to be occupied by, persons not of the white or Caucasian race. No non-Caucasians were parties to the suit. HELD: The action of the state court in awarding damages for breach of such a covenant would be state action, denying equal protection of the laws to non-Caucasians, as prohibited by the Constitution of the United States.[1] *Barrows v. Jackson,* 346 U.S. 249, *rehearing denied,* 74 Sup. Ct. 19 (1953).

This decision represents an extension of "the new rule in *Shelley's*[2] case"[3] which,

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[12]" . . . mistake means some unintentional act, omission or error arising from ignorance, surprise, imposition or misplaced confidence." State Street Trust Co. v. Muskogee Electric Traction Co., 204 F.2d 920, 923 (10th Cir. 1953).

[13]"Mistake, in a legal sense, is the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done. It is an erroneous mental condition, conception, or conviction induced by a misapprehension or misunderstanding of the truth, without which the act complained of would not have taken place." National Loan & Investment Co. v. Bleasdale, 159 Iowa 529, 141 N.W. 456, 458 (1913). "Mistake means a state of mind that is not in accord with the facts." RESTATEMENT, CONTRACTS § 500 (1932).

[1]U. S. CONST. AMEND. XIV, § 1.

[2]Shelley v. Kraemer, 334 U.S. 1 (1948). Here the Court ruled that the granting by a state court of injunctive relief to prevent a non-Caucasian from occupying real property in violation of a restrictive covenant is state action by which the non-Caucasian is deprived of the equal protection of the laws.

[3]21 So. CALIF. L. REV. 358 (1948).

though questionable in some ways, was not unexpected.[4] In the five years which separate *Shelley v. Kraemer*[5] and *Barrows v. Jackson*, various state and lower federal courts have ruled that *Shelley v. Kraemer* and its companion case, *Hurd v. Hodge*,[6] prohibit: the award of damages for breach of racial restrictive covenants;[7] a declaratory judgment based on a racial restrictive covenant;[8] and the use of such a covenant as a defense to a cross-action in an action of trespass to try title.[9] The instant case,[10] however, represents the final chapter in the legal life of racial restrictive covenants. It is now clear that any judicial recognition of the covenants by state courts will be held to be in violation of the prohibitions of the Fourteenth Amendment.[11]

Although the rule announced in *Shelley v. Kraemer* and broadened in *Barrows v. Jackson* will, as a practical matter, effectively obliterate the racial restrictive covenant as far as its legal value is concerned, it runs afoul of certain logical difficulties when analysis is attempted. In the *Barrows* case, the Court affirms its holding[12] that, although the covenants are not enforceable in any court, they are still valid contracts.[13] American courts have steadfastly refused to declare the covenants themselves void,[14] although they have not been averse to denying enforcement of them on other grounds.[15] The concept of the contract which is unenforceable, yet not void, is not new to the Anglo-American law.[16] However, the previous instances in which the doctrine has been applied have apparently all involved contracts made unenforceable by either the statute of frauds or the statute of limitations.[17] Such contracts, even though unenforceable, may still have some legal operation.[18] The rule applied to the racial restrictive covenants is different, in that it allows for no possible legal operation of the unenforceable contracts. The Court has, it appears, done indirectly what it stoutly maintains it has not done. It has rendered the covenants void for all practical purposes.

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[4]The outcome of the instant case was foreshadowed by the decision of the Michigan court in Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952). Such a holding was predicted by several legal periodicals. 61 HARV. L. REV. 1450 (1948); 21 So. CALIF. L. REV. 358 (1948); 17 U. OF CIN. L. REV. 277 (1948).

[5]For analysis and discussion of the *Shelley* case and the decisions leading up to it, see 20 MISS. L.J. 101 (1948); Note, 3 A.L.R.2d 466 (1949).

[6]334 U. S. 24 (1948).

[7]Roberts v. Curtis, 93 F. Supp. 604 (D.C. 1950); Phillips v. Naff, *supra* note 4. *Contra*: Weiss v. Leaon, 309 Mo. 1054, 225 S.W. 2d 127 (1949); Correll v. Earley, 205 Okla. 366, 237 P.2d 1017 (1951).

[8]Claremont Improvement Club v. Buckingham, 88 Cal. App.2d 891, 200 P.2d 47 (1948).

[9]Clifton v. Puente, 218 S.W.2d 272 (Tex. Civ. App. 1948).

[10]Barrows v. Jackson, *supra*.

[11]Recognition in federal courts will be denied on the bases of public policy and a federal civil rights statute, REV. STAT. § 1978 (1875), 8 U.S.C. § 42 (1946). Hurd v. Hodge, *supra* note 6; Roberts v. Curtis, *supra* note 7.

[12]The "valid, but unenforceable" doctrine had its origin in *Shelley v. Kraemer*, *supra* note 2.

[13]Barrows v. Jackson, 346 U.S. 249, 253 (1953).

[14]Barrows v. Jackson, *supra* note 13; Shelley v. Kraemer, *supra* note 2; Corrigan v. Buckley, 271 U.S. 323 (1926); Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P.2d 720 (1944); Swain v. Maxwell, 355 Mo. 448, 196 S.W.2d 780 (1946); Ridgway v. Cockburn, 163 Misc. 511, 296 N.Y.S. 936 (1943). *Contra*: Gandolfo v. Hartman, 49 Fed. 181 (C.C.S.D. Cal. 1892). *See* Mays v. Burges, 147 F.2d 869, 873 (D.C. Cir. 1945) (dissenting opinion). In Canada a similar covenant was held to be void as against public policy. *In re* Wren [1945] O.R. 778, [1945] 4 D.L.R. 674.

[15]Miller, *Race Restrictions on the Use or Sale of Real Property*, 2 NAT'L B.J. 24 (1944). The author of the cited article was also counsel for respondent in the noted case.

[16]1 CORBIN, CONTRACTS § 8 (1950); 5 *id.* § 993; 6 *id.* §§ 1377, 1382.

[17]*Ibid.*

[18]*Ibid.*

Another interesting aspect of the *Barrows* case is the Court's failure to be guided by one of its rules of self-restraint[19] which was apparently applicable to the case. The rule, which requires that one who challenges the constitutionality of an act must show that his personal rights have been abridged by it, was by-passed on the ground that the situation involved was "unique."[20] No abridgment of respondent's constitutional rights was alleged. The only rights set up were those of unspecified non-Caucasians. It is submitted that the circumstances involved in the *Barrows* case were no more "unique" than were those involved in numerous other cases in which the Court applied the rule.[21]

Regardless of what may be said or thought of the propriety of the Court's decision in the instant case, or of the legal structure in which it is contained, this much would seem clear: racial restrictive covenants are now legally useless. There will doubtless be much academic discussion of certain features of the decision, but its ultimate result is unmistakable.

J. David Orlansky

CORPORATIONS——NEW LAW FOR THE CLAYTON ACT

This was an action involving a proceeding on motion by the Government for summary judgment, seeking an order directing resignation of the individual defendant as director of one or both of the corporate defendants[1] because of an alleged interlocking directorate in violation of the Clayton Antitrust Act.[2] HELD: Section 8 of the Clayton Act is not limited to hypothetical mergers, hence the individual defendant must resign from the board of directors of one or both of the defendant corporations. *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D. N.Y. 1953).

The issue presented for decision was whether the defendant corporations were competitors within the meaning of the interlocking directorate clause of the Clayton Act.[3] The defendant corporations admitted that they were competitors in several items of goods[4] but contended that Section 8 of the Clayton Act was limited by the

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[19]*See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (partial dissenting opinion). A listing of the Court's self-imposed rules of self-restraint will be found here.

[20]Barrows v. Jackson, *supra* at 257.

[21]*See* Barrows v. Jackson, *supra* at 260 (dissenting opinion). It is significant that Mr. Chief Justice Vinson, who was the author of the Court's opinion in *Shelley v. Kraemer, supra* note 2, was the author of the dissent in the instant case. In this opinion the Chief Justice cites a large number of cases in which the rule has been applied. Barrows v. Jackson, *supra* at 265, n.6.

[1]The individual defendant was Sidney J. Weinberg and the corporate defendants were Sears, Roebuck & Co. and B. F. Goodrich Co.

[2]"No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been heretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. . . . " 38 STAT. 730 (1914), 15 U.S.C. § 19 (1946).

[3]See note 2 *supra*.

[4]Defendants were competitors in the sale of 7 categories of goods in 97 communities located in 31 states of the United States through 110 retail outlets of Sears and 112 retail stores of Goodrich.

"so that . . . " clause[5] to those situations where there has been a merger between two corporations or the acquisition of stock by one in the other. Thus their contention was that the Government must use the merger test of Section 7 of the Clayton Act[6] and prove that a hypothetical merger between defendants would be in violation of the antitrust laws. It was the contention of the Government that Section 8 is not so limited in scope but applies to any agreement which has been negatived by any antitrust law.[7] The Government then concluded with the contention that an agreement between defendants would be in violation of such laws, even though the evils of a merger could not be proved.

When the Sherman and Clayton Acts were passed the business of the nation was directly controlled by a relatively small group of people who served on the boards of numerous corporations. In 1914, the year of the passage of the Clayton Act, a great number of these directors who were serving on more than one board resigned.[8] The number of such resignations was relatively small, however, compared to those remaining so there was still ample opportunity to test the new law. The Government took cognizance of this fertile field of test cases but seemed reluctant to enforce Section 8, and as a result the Federal Trade Commission has never issued a cease and desist order on the basis of the section under discussion.[9] The Department of Justice, showing a little more concern, has instituted several suits, even before the instant one, based on alleged violations but because of resignation by the director, or because of entry of a consent decree, none of the cases ever came to trial.[10]

As a result of this apathy on the part of the Government it soon became apparent that the evils the Clayton Act was passed to remedy, in regards to interlocking directorates, still remained. It was disclosed in a recent survey of directorates in the thousand largest United States manufacturing corporations that there are approximately one thousand persons who serve as directors in more than one corporation—with many of these being competing corporations.[11] One of these directors so serving was the defendant in the present case. The Government announced suit and the present director, unlike those in previous cases, refused to resign; the Government actually litigated the matter with the result being a decision in favor of the Government.

The importance of this suit is two-fold: first, it shows a manifest intent on the part of the Government to enforce Section 8, as it applies to interlocking directorates; and second, there is now a court interpretation of that section. By this interpretation the applicability of the section is greatly expanded and is not limited to a merger or

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[5]See note 2 *supra*.

[6]"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 38 STAT. 731 (1914), as amended, 64 STAT. 1125 (1950), 15 U.S.C.A § 18.

[7]See, *e.g.*, sections 1 and 2 of the Sherman Act. 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U.S.C.A. § 1.

[8]The Morgan firm was one of the first large firms to announce voluntary withdrawals. In the latter part of 1913 and early months of 1914 firm members withdrew from over thirty boards. See, N.Y. Times, Jan. 3, 1914, p. 1, col. 1. Samuel Untemeyer, who was counsel for the Pujo Committee, was quick to point out that despite the resignations of some of the firm members of Morgan, other members remained on the same boards. *Id.* at p. 2, col. 3.

[9]See Means, *Interlocking Directorates*, 8 ENCYC. OF SOC. SCI. 148, 151 (1932). Although this article was written in 1932 it is still accurate because no orders have since been issued. Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 YALE L.J. 1270 (1950).

[10]Kramer, *supra* note 9.

[11]*Id.* at 1272.

acquisition, but is made broad enough to include all methods of antitrust violations. Thus the precedent is finally set for making effective a section of our law which has been heretofore completely inoperative.[12]

Ernest R. Duff

INCOME TAXATION — EXPENSE OF ATTENDING TAX INSTITUTE BY LAWYER DEDUCTIBLE AS BUSINESS EXPENSE

Petitioner was a member of a firm of lawyers which did general practice, and his partners depended on him to keep informed as to the changes in the tax laws. Petitioner attended a federal taxation institute at New York University, which was designed for people who had done tax work, and from which students were warned away. He deducted his expenses incurred in attending as business expenses, but the Commissioner and the Tax Court disallowed the deduction because of the personal nature of the object pursued by the petitioner. HELD: Petitioner could deduct as a business expense because of the "moral obligation" owed to the firm. *Coughlin v. Commissioner,* 203 F.2d 307 (2nd Cir. 1953).

The subject case presented the problem of where to draw the line between personal expenditures and business expenses. The court reached the conclusion that the moral obligation to keep abreast of the changing tax laws was more closely akin to a business expense that was required to maintain one's status of employment than it was to acquiring personal knowledge.

The Internal Revenue Code states that all "ordinary and necessary expenses" incurred during the year in carrying on a business or trade are deductible from gross income.[1] The Code further states, however, that no deduction is allowed for personal expenses,[2] or for capital expenditures.[3] In applying these sections of the Code, it has been held that expenses incurred by a doctor taking postgraduate courses,[4] an engineer taking a course in engineering,[5] a professor in connection with his doctor's dissertation,[6] and a teacher attending summer school,[7] were not deductible because they were personal expenses. The last decision was modified[8] following a federal court decision in *Hill v. Commisssioner,*[9] wherein the court found that when a teacher was *required* to attend summer school[10] in order to continue the practice of her profession, the expense incurred was a necessary deductible business expense.[11]

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[12]Since the decision in the instant case the courts have made the enforcement of Section 8 even more effective by the decision in the case of *United States v. W. T. Grant Co.,* 345 U.S. 629 (1953). In that case the Government brought suit and the defendant director resigned, whereupon the trial court dismissed the action as moot and refused to enjoin the defendant's future activities in regard to interlocking directorates. The Government appealed and the United States Supreme Court said, affirming on other grounds, "The resignation of an interlocking director does not render a Clayton § 8 controversy moot, entitling defendants to mandatory dismissal."

[1]INT. REV. CODE § 23 (a) (1) (A).

[2]INT. REV. CODE § 24 (a) (1).

[3]INT. REV. CODE § 24 (a) (2).

[4]O.D. 984, CB Dec. 1921, p. 171.

[5]Knut F. Larsen, 15 TC 956 (1950), citing O.D. 984, *supra* note 4, and O.D. 892, CB June 1921, p. 209.

[6]P-H 1952 TC MEM. DEC. 52,173 (1952).

[7]O.D. 892, CB June 1921, p. 209.

[8]I.T. 4044, CB 1951-1, p. 16.

[9]181 F.2d 906 (4th Cir. 1950).

[10]The teacher's certificate expired and could only be renewed by acquiring college credits or by passing an examination on five selected books.

[11]For further discussion of the *Hill* case see: 27 N.D.L. REV. 67 (1951), 1951 WIS. L. REV. 366.

It will be noted, then, that expenses incurred for education are deductible when the education is *required* for the purpose of *maintaining* a position, but if the expenses are incurred in the process of acquiring education for the purpose of obtaining a new or better position, or for other reasons,[12] they are not deductible.

The Court of Appeals in the instant case finds that the facts are closely akin to those of the *Hill* case,[13] As welcome as this decision might be, it is very difficult to see the relationship. In the one case the teacher was *required* to attend school in order to maintain her position, whereas in the instant case the petitioner only had a moral obligation and would not have been penalized had he failed to attend the institute.

The court based its decision on the fact that the taxpayer was "morally bound to keep so informed and did so in part by means of his attendance at this session of the Institute,"[14] and that this "need to incur the expenses in order to perform his work with due regard to the current status of the law so overshadows the personal aspect that it is the decisive feautre."[15] Can it be said that "moral obligations" are a valid basis for a deductible business expense? Certainly the common dislike for taxpaying will be considerably lessened if money expended because of moral obligations is deductible from gross income.

If these deductions are valid for a lawyer who does tax work and has a moral obligation to keep sharp the tools he uses in his business, it would seem that the same should apply to other trades or businesses.[16]

John T. Keeton

Navigable Waters — Right of Riparian Owner to Artifical Accretion

The United States, in dredging Mobile Bay for the construction of a ship channel, removed material from the bottom of the bay and piled it up against the land of the riparian owner, creating some fifty-six new acres of land. The State of Alabama in an action to quiet title seeks to establish its claim to this addition. Held: Such new land became the property of the riparian owner, and not that of the State or the United States Government, even though such was man made and not a gradual accretion. *State v. Gill*, 66 So.2d 141 (Ala. 1953).

Determination of this case required that the Alabama court decide whether rapidly and artificially accreted land belonged to the State or the riparian owner. The court reached its decision by declaring: "Consequently there is no title inherent in a gallon of fluid mud, silt or clay that comes from the bottom and flows through the pipes of an hydraulic dredge to its final resting place in the new land that it makes."[1] Thus, it reasoned, the title lies in the riparian owner and not in the state.

It will be noted that the accretion was both artificial and rapid. At common law,

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[12]The other reasons mentioned in the *Hill* case were: obtaining a teaching position, or qualifying for permanent status, a higher position, an advance in the salary schedule, or to fulfill general cultural aspirations.

[13]Hill v. Commissioner, 181 F.2d 906 (4th Cir. 1950).

[14]203 F.2d 307, 309 (2nd Cir. 1953).

[15]*Ibid.*

[16]On the basis of this decision, may expenses now be deducted which are incurred by doctors in taking refresher courses in obstetrics, dentists in learning new techniques of oral surgery, plumbers in learning new methods of threading pipes, and accountants and insurance men in attending tax institutes?

[1]State v. Gill, 66 So.2d 141, 145 (Ala. 1953).

accretion is an addition to riparian land *gradually* and *imperceptibly* made by the water to which the land is contiguous.[2] The majority view has further provided that though witnesses may see from time to time that progress has been made, they could not perceive the accretion while the progress was going on.[3]

A majority of the courts have provided further that whether accretion is natural or artificial does not affect the riparian owner's title in the new land.[4] In order for alluvion to become the property of the riparian owner under these cases, the formation may be either natural or artificial, but it must be gradual and imperceptible.

Research does not disclose any decision in which a rapid addition to land was held to be an accretion to the holdings of the riparian owner. A California court by way of dicta said " . . . artificially filled tide lands, filled rapidly and not gradually and imperceptibly, belong to the state or its grantees and do not belong to the upland owner."[5] A situation comparable to the instant case is found in the federal case of *Marine Ry. and Coal Co. v. United States*[6] There the Federal Government in improving the channel of the Potomac River built a riprap sea wall[7] below the low-water mark and deposited the material dredged from the bed of the river between the wall and the mean high-water mark on the Virginia shore. The court held: "The rule is without exception that so long as the sovereign remains owner of submerged soil, it retains the fee to the soil reclaimed."[8]

The subject case has presented a definition of accretion entirely repugnant to that known to the common law. Under the circumstances,[9] the result reached by the court appears to be entirely just. However, the adoption of a theory of "streamlined" accretion will approach a conflict with the common law treatment of avulsion.[10] The disposition of the case should have been on grounds other than accretion.

W. Marion Smith

WORKMEN'S COMPENSATION — INJURY SUSTAINED IN FOOTBALL PRACTICE AS BASIS FOR AWARD.

Because of his football prowess, the claimant was given a part-time job by the University keeping the tennis courts clear, and his job was contingent upon his continuing to play football. He was injured in spring football practice and lost the job when he was unable to continue to play ball. HELD: The injury was in the course of and arose out of the employment and claimant was entitled to compensation. *University of Denver v. Nemeth,* 257 P.2d 423 (Colo. 1953).

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[2]65 C.J.S. NAVIGABLE WATERS §81.

[3]Solomon v. Sioux City, 243 Iowa 634, 51 N.W.2d 472 (1952); Sharp v. Learned, 195 Miss. 201, 14 So.2d 218 (1943); Denny v. Cotton, 3 Tex. Civ. App. 169, 22 S.W. 122 (1893).

[4]St. Clair County v. Lovingston, 23 Wall. 46 (U.S. 1873); State of Kansas v. Meriwether, 182 Fed. 457 (8th Cir. 1910); Solomon v. Sioux City, *supra* note 3. *Contra:* Humble Oil and Refining Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir. 1951); Lorino v. Crawford Packing Co., 142 Tex. 51, 175 S.W.2d 410 (1943).

[5]Carpenter v. City of Santa Monica, 63 Cal. App.2d 772, 147 P.2d 946 (1944).

[6]265 Fed. 437 (D.C. Cir. 1920).

[7]A sustaining wall of stones thrown together without order, as in deep water or on a soft bottom.

[8]Marine Ry. and Coal Co. v. United States, 265 Fed. 437, 443 (D.C. Cir. 1920).

[9]Defendant landowner (Gill) had no right of action against the state in either a court of law or equity. State v. Gill, 66 So.2d 141, 145 (Ala. 1953).

[10]For a discussion of avulsion see 4 TIFFANY, REAL PROPERTY §623 (3rd ed. 1939).

In the instant case the court ruled that to be entitled to compensation, an employee need not be engaged in the actual performance of work when injured, but it suffices if he is upon the premises of the employer, occupying himself in a manner consistent with his contract of hire. Here the claimant's football ability was held to be an incident of employment. Previously, the Colorado courts had ruled that if the accident occurs while the employee is doing something which the employer has directed and under the contract of employment may require the employee to do, he is acting in the course of his employment, and, if the manner of the employee's action is within limits of a reasonable discretion given him, the resulting accident arises out of the employment and is a result of hazards incident thereto.[1]

The majority of states' compensation statutes require that an injury be "in the course of" and "arise out of" the employment.[2] A small minority require that the injury merely "be in the course of" the employment.[3]

Temporary detachment from duty does not necessarily defeat compensation, especially where rest or lunch periods are provided by the employer.[4] The majority test seems to be whether the employe was injured in some logical manner pertaining to, or incidental to his employment.

It would seem that the only requirement for incidents of employment is that they be reasonable under the existing conditions. The phrase "in the course of" is generally considered to denote the time and place that the injury was received. The majority view seems to be to construe this phrase as meaning "within the scope of the employment."[5]

"Arising out of" means actual, causal connection[6] between the employment and the injury. It conveys the idea that the injury could have been foreseen as a result of the actual employment,[7] but the majority of courts interpret it as meaning that the injury appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.[8] The majority fol-

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[1]Skaggs Co. v. Nixon, 101 Colo. 203, 72 P.2d 1102 (1937).

[2]Out of 48 states, 43 provided that the injury arise out of the employment and 47 had provisions that the injury be in the course of the employment. See REEDE, ADEQUACY OF WORKMEN'S COMPENSATION, Table 7, p. 40 (1947).

[3]HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION 154 (1944). North Dakota, Pennsylvania, Texas and Washington require only that the injury occur "in the course of" the employment.

[4]*Id.* at 112.

[5]It is generally held that an injury arises in the course of employment when it takes place within the time of employment, at the place of employment, while the employee is fulfilling duties of his employment, and as a result of risks involved in the employment. 1 CAMPBELL, WORKMEN'S COMPENSATION, § 130. Acts of personal ministration are almost always held to be incidents of the employment. Where a painter used a roof to get fresh air and fell to his death there could be an award of compensation. Moschinger v. Henry Heide, Inc., 256 App. Div. 1019, 10 N.Y.S.2d 406 (1939). As a rule anything that is contractual or reasonable to the employment will generally be compensable. However, if an employee engages in something purely personal then it is no longer an incident to the employment, and hence not compensable. Where the employee deviated to pick up a paper on his return from the toilet and was injured, he was held to have left the sphere of his employment and therefore did not have a compensable claim. Horton's Case, 275 Mass. 572, 176 N.E. 648 (1931). " . . . Decisions in tort cases and the definitions therein should not be followed too closely in compensation cases." Heiliger v. City of Sheldon, 236 Iowa 146, 18 N.W.2d 182 (1945).

[6]Gates v. Central City Opera House Association, 107 Colo. 93, 108 P.2d 880 (1940).

[7]Rafferty v. Dairymen's League Co-op Assn., 16 N.J. Misc. 363, 200 Atl. 493 (1938).

[8]Permanent Construction Co. v. Industrial Commission, 380 Ill. 47, 43 N.E.2d 557 (1942).

low the rule as laid down in Massachusetts: an injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment looked at in any of its aspects.[9]

The instant case seems to be in line with what the majority of courts would hold under similiar conditions. Most compensation statutes are to be construed liberally and this does not carry it beyond sensibility.

Robert S. Reeves

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[9]An employee who was injured when the employer's walls fell on him during hurricane was given compensation. Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940). Under the old Massachusetts rule, it would have been necessary that the causative danger have been peculiar to the work and not the neighborhood. *In re* McNicol, 215 Mass. 497, 102 N.E. 697 (1913).

RECENT BOOKS

BENDER'S FEDERAL PRACTICE FORMS. By Louis R. Frumer. New York: Matthew Bender & Company, Incorporated, 1952. Pp. 2318, five volumes, $18.50 per volume.

Probably the most important part of any reference work is the table of contents and index, and conversely a reference work without adequate means of locating data desired is worse than useless. *Bender's Federal Practice Forms,* in addition to having a most complete table of contents, is organized around the Federal Rules of Civil Procedure, a logical arrangement to say the least. The set of books begins by quoting Rule One, and gives a brief annotation thereto. Rule One calls for no forms and therefore none are found thereunder. The other rules follow in numerical order, with forms applicable to the several rules grouped under them. For example, Rule Five is quoted on page sixty-two of volume one and is followed by three pages of discussion, cross-references and annotations. This rule, having to do with service of pleading, has listed under it approximately twenty-five forms, covering every conceivable problem relating to service of pleading.

The author of this work acknowledges in numerous instances throughout the three volumes that a particular form is adapted from a pleading filed in an action where it was tested under fire. The work is annotated primarily to *Moore's Federal Practice,* an encyclopedia on the same subject published by Matthew Bender & Company. However, from examining these cross-references and other annotations there is no question but that *Bender's Federal Practice Forms* is not dependent upon *Moore's Federal Practice* and can be used very effectively without that work. Of course, the two sets of books are mutually helpful, and it is desirable to have both if possible. As has been indicated, there are numerous citations to cases and references to works other than *Moore's.*

One thing which should be pointed out is the loose-leaf construction of this set of books. The binding is handsome and sturdy with an improved lock which makes removal or insertion of pages very easy.

Too frequent dependence by an attorney upon prepared forms weakens him as a pleader rather than strengthens him. However, federal practice is not familiar to most young lawyers, and to many older ones, and there is a real need for a work of this type among those lawyers not familiar with this field of practice. *Bender's Federal Practice Forms* is recommended as a worthwhile investment for anyone wishing to do a federal practice.

*Denton Gibbes**

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*Welch, Gibbes and Butts,
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ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES. By William Baskerville Hamilton. Duke University Press, Durham, 1953. Pp. 498. $12.50.

"It may for aught I know, be my fate to fall among the American Worthies. When and if it should so happen, to my God and to your Friendship I Commit the Charge of my Affairs, my Wife and my Children, whom I hope you will always remember with a brotherly tenderness. But don't leave Betsey know I am so near the Seat of Danger. It may give her many groundless apprehensions and much Uneasiness, in her present situation. I would not have her alarmed on my Account."

The foregoing is an extract from a letter written by Colonel Thomas Rodney, Commander of the Delaware Militia, to his brother Caesar, a signer of the Declaration of Independence, on the night preceding the crossing of the Delaware. All of his life Thomas Rodney liked to put words on paper — on stray sheets, in note books, diaries, any kind of paper readily at hand. He had been an ardent advocate of independence long before 1776. Not for this reason, but for many others, he was considered by his friends and neighbors to be an eccentric and mystic and a complete failure in dealing with the practical every day affairs of life.

This interesting figure was in 1803 appointed by President Jefferson a judge of the Mississippi Territory, to the duties of which was added the additional burden of undertaking to settle the tangled land claims in the Natchez region. Except for the Burr trial, in which his conduct was vacillating, he performed his judicial duties with exceptional energy and to the general satisfaction of the bar. He also continued diligently at his diaries, recording facts and opinions in frequently misspelled words and with the usual capitalizations of the day. His opinions of men and law are here found in great detail. Civil and criminal law, that roguish thing called equity, procedural and substantive law; trials in the circuit and supreme courts of the Mississippi Territory are here to be found along with observations on his work in chambers. His charges to the grand juries are sometimes set out in full and are, generally, brilliant expositions on the common law, religion and history, with nary a word about the use of alcoholic beverages or the prohibition thereof.

As is the case with almost all historical material, to say nothing of even more valuable assets, these diaries are not to be found in Mississippi, where they were written and with which they are entirely concerned, but are now widely scattered in various libraries and private collections, having been sold at public auction in 1919 by Henkels, the Philadelphia autograph dealer. Copies of the catalogues now on file in the New York Public Library fail to indicate that any of them came back to the point of their origin, though a number were bought by the State of Delaware. It was to the Historical Society of the latter state, as well as the Library of Congress, Brown University, the Historical Society of Pennsylvania, and other repositories that Professor William Baskerville Hamilton went for the source material of this fascinating book. Roughly one-third biography and two-thirds "judicial notes," Professor Hamilton has produced an interesting and most worth-while study of this curiously brilliant man, who claimed to converse directly with the Angel Gabriel who use him as a messenger to transmit information to General Washington.

It is noteworthy that Judge Rodney was, in addition to being plagued with an associate who was an habitual drunkard, who would now be called an alcoholic, beset by somewhat the same problems as perplex his brethren of the present day. Did the plaintiff recover judgment? Then the verdict is contrary to law and against the overwhelming weight of the evidence and so excessive as to evince passion, prejudice and corruption on the part of the jury.

Some lawyers of finished education and scholarly attainments had come early to the Territory but they lived at Natchez. When the local streams were swollen they could not get to Washington to court, and when the weather was extreme they would not do so. When they did get there they did not always conduct themselves with that high degree of decorum expected by Rodney and he sometimes had to resort to contempt proceedings to protect the dignity of his court.

Altogether these diaries present a graphic and accurate picture of the courts and practice of the early days of the Mississippi Territory.

*Quitman Ross**

BOOKS RECEIVED

A Casebook of Law and Business. By William H. Spencer and Cornelius W. Gillam. New York: McGraw-Hill Book Company, Incorporated, 1953. Pp. 968. $8.00.

Learning Parliamentary Procedure. By Alice Sturgis. New York: McGraw-Hill Book Company, Incorporated, 1953. Pp. 358. $4.00.

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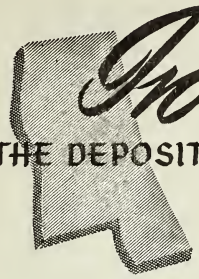

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